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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1011

MARIETTA NORTON, OSCAR HEFFNER, RICHARD CRAWFORD, JOSEPH GARBER, DAVID COKER, ROBERT McCALL, and MIKE HAGA,

Petitioners,

v.

THE DISCIPLINE COMMITTEE OF EAST TENNESSEE STATE UNIVERSITY; its members, MACK DAVIS, ELLA ROSS, DORMAN STOUT, WILLENE PAXTON, JOAN DRESSEL, JOHN MERCER, PHIL THOMAS; EAST TENNESSEE STATE UNIVERSITY; its president, DELOS P. CULP; and THE STATE BOARD OF EDUCATION OF AND FOR THE STATE OF TENNESSEE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	17
I.	17
A. The right to hand out non-disruptive leaflets.	18
1. The perversion of the "material and substantial interference" test and the need for the "clear and present danger" test.	18
2. The question of the "hecklers' veto."	19
3. The nature of the speech allowable on a college campus.	21
B. The complete absence of regulations is the most extreme manifestation of the evils of vagueness and overbreadth.	22
II.	23
CONCLUSION	26
APPENDIX:	
Opinion of the Court of Appeals:	
Majority	1A
Dissent	18A
Oral Opinion of the District Court	36A
Written Findings of the District Court	45A
Analysis of Truth or Falsity of Facts Stated in Leaflets	51A

TABLE OF AUTHORITIES

Page

Cases

Brooks v. Auburn University,
412 F.2d 1171 (5th Cir. 1969) 23

Brown v. Louisiana,
383 U.S. 131 (1966) 20

Buchanan v. Warley,
245 U.S. 60 (1917) 19-20

Butts v. Dallas Independent School District,
38 U.S.L.W. 2334 (N.D. Tex., Dec. 5, 1969) . . . 19,20

Cooper v. Aaron,
358 U.S. 1 (1958) 20

Cox v. Louisiana,
379 U.S. 536 (1965) 22

Dean Milk Co. v. City of Madison,
340 U.S. 349 (1951) 20

DeJonge v. Oregon,
299 U.S. 353 (1937) 22

Dixon v. Alabama State Board of Education,
294 F.2d 150 (5th Cir.),
cert. denied, 368 U.S. 930 (1961) 25

Dombrowski v. Pfister,
380 U.S. 479 (1965) 18

Edwards v. South Carolina,
372 U.S. 229 (1963) 22

Esteban v. Central Missouri State College,
277 F. Supp. 649 (W.D. Mo. 1967) 25

Ferrell v. Dallas Independent School District,
392 F.2d 697 (5th Cir.),
cert. denied, 393 U.S. 858 (1968) 20

TABLE OF AUTHORITIES (Continued)

Page

Cases (Continued)

Griswold v. Connecticut,
381 U.S. 479 (1965) 20

Jones v. State Board of Education,
cert. granted, 90 S. Ct. 145 (1969)
(No. 731, 1969 Term) 17,18,21,22,26

King v. Smith,
392 U.S. 309 (1968) 20

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 22

Pickering v. Board of Education,
391 U.S. 563 (1968) 22

Russell v. United States,
369 U.S. 749 (1962) 24

Sherbert v. Verner,
374 U.S. 398 (1963) 20

Soglin v. Kauffman,
No. 17,427 (7th Cir., Oct. 24, 1969) 22-23

Stacey v. Williams,
No. WC 6725-K (N.D. Miss., Dec. 1, 1969) 22

Terminiello v. City of Chicago,
337 U.S. 1 (1949) 21,22

Tinker v. Des Moines Independent School District,
393 U.S. 503 (1969) 18,19

United States v. Lattimore,
127 F. Supp. 405 (D.D.C.),
aff'd by equally divided court,
232 F.2d 334 (D.C. Cir. 1955) 25

Wood v. Georgia,
370 U.S. 375 (1962) 22

TABLE OF AUTHORITIES (Continued)

Page

Constitution of the United States

Article 1 § 9 cl. 3 2,4,23

First Amendment 2,3,17,18,19,20,22,23,24

Sixth Amendment 24

Fourteenth Amendment 2,3,17,23

Statutes

28 U.S.C. § 1254(1) 1

Other Authorities

Hukari, *How to Combat Campus Radicals,* Human Events, Nov. 15, 1969, at 11 20

Joint Statement on Rights and Freedoms of Students, 53 A.A.U.P. Bull. 365 (1967) 8

Ratner, *The Function of the Due Process Clause,* 116 U. Pa. L. Rev. 1048 (1968) 20

Van Alstyne, *The Student as University Resident,* 45 Denver L.J. 582 (1968) 25

IN THE SUPREME COURT OF THE UNITED STATES

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THE DISCIPLINE COMMITTEE
OF EAST TENNESSEE STATE UNIVERSITY, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Sixth Circuit, affirming the district court, are not yet reported; they are appended hereto at pages 1A and 18A, respectively. The United States District Court for the Middle District of Tennessee did not file a written opinion. Its oral opinion is appended at 36A and its written findings of fact and conclusions of law at 45A.

JURISDICTION

The judgment and opinion of the court of appeals were entered on November 28, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. May a state university, conformably with the first and fourteenth amendments of the Constitution of the United States, suspend students from the university for on-campus distribution of leaflets criticizing the university policies when:

(a) no interference with or disruption of the university's functioning occurred either in connection with the distribution or thereafter, the only reaction being a visit to a dean by other students who said they wanted "to get rid of" the leafleters, and there was no particularized forecast of disruption; and

(b) there was no university regulation prohibiting the activity for which the students were suspended.

2. Did the procedures followed by a state university in suspending students for distributing leaflets conform with the due process clause of the fourteenth amendment of the Constitution and adequately protect the students' rights under the first amendment, the equal protection clause of the fourteenth amendment, and the bill of attainder and *ex post facto* clause of article I § 9 cl. 3 of the Constitution when:

(a) the charges were vague and overbroad, alleging distribution of materials "of a false, seditious, and inflammatory nature";

(b) the university presented no evidence, thereby rendering it impossible to have proved that the materials were false, seditious, and inflammatory and placing the burden of proof on the accused;

(c) there was not an impartial tribunal in that members of discipline committee (which heard the charges against the students) also initiated, investigated, and prosecuted the charges, and said members, as well as the president of the university (who reviewed the suspensions and for whom the committee functioned), also considered themselves as counselors, were the persons about whom the students allegedly wrote, considered matters within their personal knowledge

which were either not brought out at the hearing or were only brought out in the words of the members or president themselves (thus making them witnesses as well), and they felt personally affronted by the students' speech;

(d) there was insufficient time (three days, including the week-end, and, in one case, one day) between the notification of the charges and the date of the hearing, and a request for continuance was refused without valid grounds for the refusal;

(e) the refusal to grant a continuance also deprived the students of the opportunity to have counsel present or to adequately consult with counsel;

(f) an adequate transcript was not made, the Discipline Committee having advised the stenographer (the president's secretary) to use her discretion as to what to include therein; and

(g) the students had no opportunity to or were not made aware of their right to present, confront, and cross-examine witnesses.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. *U.S. Const.* amend. I

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. *U.S. Const.* amend. XIV § 1.

No bill of attainder or ex post facto law shall be passed. *U.S. Const.* art. I § 9 cl. 3.

STATEMENT OF THE CASE[1]

This is an action for an injunction requiring that plaintiffs-petitioners (the "Students") be reinstated in good standing after having been suspended from East Tennessee State University (the "University") and that any indication of the suspension be expunged from their records.

All seven students were indefinitely suspended from the University for distributing either or both of two sheets of mimeographed literature, each entitled "Students are People Too." (13a;[2] leaflets are reprinted as an appendix to the court of appeals' opinion at 11A-17A).

The suspensions were on the grounds that the distribution of literature *"could conceivably* cause an eruption on the campus which would disrupt the functioning of the university." (147a) (emphasis added)

Students Norton, Garber, McCall, Crawford, and Haga were first notified of the University's disciplinary action by letters dated Friday, May 31, 1968, notifying them to appear before the Discipline Committee on Monday, June 3, 1968, "to answer charges of the alleged distribution on the campus of East Tennessee State University of materials which are of a false, seditious, and inflammatory nature." (13a-14a, 20a)

The notification cited no University rule. The University contended, instead, that the students were disciplined under its

---

[1] The facts set forth in Judge Celebrezze's dissenting opinion at 19A-26A, 32A n. 7, 33A also adequately state the case.

[2] The Appendix filed with the Court of Appeals is filed herewith for reference (in addition to the certified record). Its page numbers are followed by the suffix "a" and will be so referred to herein. Reference to the materials appended to this petition will be identified by the suffix "A" after the page number.

"inherent authority" "to maintain discipline and proper order" (43a), a proposition accepted by the court of appeals (10A).

Student Oscar Heffner received a letter dated May 29, 1968, notifying him to appear before the Discipline Committee on May 30, 1968, to answer charges of "distribution of materials of an inflammatory nature apparently intended to incite to riot." (14a, 21a)

Student David Coker received no written notice of charges. He testified that on June 4, 1968, he was talking to Dean Ella Ross, who asked if he were "one of the news boys." (105a) He replied that he had distributed literature. Dean Ross told him that the Discipline Committee would like to talk with him, and asked him to choose a time the next morning that would be convenient. Coker did not realize that he was having a hearing where his continued status as a student was being adjudicated. (106a)

All of the students appeared at the appointed times for their hearings, and, except for Oscar Heffner, who appeared with counsel (40a), and David Coker, who didn't realize he was being charged with anything (105a-06a), asked for counsel and a continuance to allow their counsel to be present. (40a, 151a) Marietta Norton and Joseph Garber testified that during the weekend allotted to them to prepare for the hearings (which was the weekend immediately prior to final examinations), the only lawyer they could find who was willing to take their case could not be present on Monday. Since the University administrative offices were closed over the weekend, the first opportunity they had to ask for a continuance was on Monday. Then then asked for a continuance to Saturday, June 8, so that their lawyer, who would then be back in town, could be present. (50a-51a).

This request was denied. The explanation offered by Dean Davis, the Chairman of the Discipline Committee, for the denial (152a) is difficult to understand. The district court felt it to be invalid (170a).

No testimony against the students was presented. (168a) Dean Davis explained that no student had asked to present witnesses, and that the Discipline Committee had not felt it was necessary to call witnesses. *(Id.)* Joseph Garber testified that he had asked if he could call character witnesses at his hearing, and had received no answer. (77a) Dean Davis said that he did not remember Garber's request, but that if Garber had insisted upon calling character witnesses, he would have been allowed to do so. (168a)[3]

Because no witnesses were presented, the Students had no knowledge concerning what evidence was being considered by the Committee, or who had supplied the evidence. Since, aside from the students' ready admissions that they had passed out the leaflets, the testimony at the hearings was non-incriminatory (See, *e.g.*, 126a), it is apparent that something dehors the record entered into the decision. Dean Davis' testimony makes this explicit:

(a) He was "very much disturbed" because he felt that, based on an incident which had taken place some weeks earlier in his office, he had been unjustly accused of threatening to censor the school paper. (146a)

(b) His feeling that the "handouts could conceivably cause an eruption"[4] was based on "prior [unspecified] events." (147a)

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[3] It was matters of this nature—"before the formal questioning or afterwards" (134a)—that the stenographer consistently omitted from the transcripts. *(Id.)*

[4] The University President's testimony (he had helped to draw up the charges (171a)) adds further emphasis to the remoteness of the possibility:

> I wouldn't class anything that happened as a disturbance really, nor would I classify it as a threat.
>
> Now I would have to say this, in talking to a number of students [never named, never called as witnesses], there were suggestions of possible difficulty of great magnitude. I couldn't truthfully say it was a threat as such. (179a-80a)

(c) The committee was "trying to get a picture of various disturbing activity." (156a)
(d) "[T]here was some planned disturbance . . . ." (160a) When pressed for details, the answer was: "While some of these things we can never prove, in our hearts we know that something like that is just about to happen." *(Id.)*
(e) Apparently this surmise was based in part on "the comments of students to me and my colleagues . . . ." (161a)

Dean Davis' testimony on the extent of actual disruption of the University illustrates the propensity for considering matters not only outside the evidence before the Committee but occurring at a point in time which would make it irrelevant, as well as showing the triviality of events to which he would apply the term. First he testified that the actual disruption was the demand placed upon his time by the preparation for and holding of the hearings. (165a-67a) The court asked for "some specific fact." (167a) The witness replied: "The only example I can give is an example of something that was told me" (168a). Then, on cross-examination:

> Q. In fact, did any disturbances on the campus at East Tennessee State University occur? A. Well, *during the time of hearings*, there were times when we could not actually proceed until the traffic in the hall was asked to quieten or to move away. (173a) (emphasis added)

In enlarging on this he again characterized his sources of information as not in the record made before the Committee–"information which I had . . ." (145a)–and hearsay–"I was told . . ." *(id.)*.

The district court found: "There was no proof to that effect [that the "literature actually resulted in disruption"], and there was no proof offered before the committee . . . ." (40A)

By letter dated June 7, 1968, the Students were informed by the Discipline Committee that they were found guilty of "distributing material of a false, seditious, and inflammatory

nature," (22a) and that they were indefinitely suspended from the University. Beyond this there were no findings of fact. (14a, 22a)

They exercised their right of "appeal"[5] to President Delos Culp; their appeals were denied on June 18, 1968. (15a, 30a)

Although no verbatim transcript was made, notes were kept by a stenographer, the president's secretary, at all of the hearings except that of David Coker. (130a-34a) These notes (Def. Exhs. 1, 2) were admitted (132a-33a) in the district court over the Students' objection (131a). Marietta Norton and Joseph Garber testified that the notes omitted important statements such as their request for a postponement of the hearings to obtain counsel, and that their answers to some questions were not correctly recorded. (54a, 56a, 78a)

The stenographer confirmed that her notes were not complete. (131a-33a) She had been told by Dean Davis that she did "not have to take complete notes" (131a); the selection involved the application of her discretion[6] (130a-35a).

The first side of the mimeographed sheet first distributed (on May 28) contained quotations from the Constitution of the United States, and stated that the University's students were being denied first amendment rights. (13A) This first side also contained excerpts from the *Joint Statement on Rights and Freedoms of Students*, 53 A.A.U.P. Bull. 365 (1967), approved by the American Association of University Professors and other academic groups. (14A-15A)

The second side of this first sheet complains of various

---

[5] The relation between the president and the Discipline Committee, as defined by the University's student handbook, is: "The Discipline Committee functions for the President and is responsible to him." (28a)

[6] She testified that the "most complete" notes were on Oscar Heffner's hearing. (132a) This was the first of the hearings; it was also the only one at which counsel was present.

conditions at the University and of student apathy.[7] (11A-13A)

Students Garber, Coker, McCall, Haga, and Heffner distributed this leaflet. (13a)

The top part of the second leaflet (15A-16A), distributed on May 30, contained a report of Oscar Heffner's hearing before the Discipline Committee and stated: "The administrative position appears to be that no student has the right to distribute free literature on campus." (16A) The rest of the leaflet (16A-17A) metaphorically referred to the administration as a "child" whom the students must try to educate, a characterization upon which the University (and the court of appeals, see 5A-6A) particularly relied as grounds for suspension (*e.g.*, 70a)

All of the Students except Joseph Garber distributed this leaflet. (13a)

Garber testified that the incident that motivated the Students to distribute the literature was the school newspaper editor's telling him that Dean Davis was threatening to censor the paper. (97a)

Dean Davis, the Chairman of the Discipline Committee, testified that he had called a student reporter into his office because he was concerned over an article the reporter had written "concerning his complaints about the university" and stating the reporter's opinion that "the campus would burst wide open, and that we would become known as the Columbia of the south" (137a):

> A. As I said before, I was very much disturbed, because for quite a long time, Mr. Ross had been characterizing the

---

[7] Student Garber, while being questioned by the Court, gave an example of this apathy:

> Now, to the best of my knowledge, the last piece of legislation the student government got through was two years ago, and that was a bill, Your Honor, calling for softer toilet paper. Two years. Now there could have been something else. That is how effective student government is, and this is how much attention the deans pay to them . . . ." (94a)

mediocrity of the whole university. I've been concerned about it, but in all of my ten years as dean, I had never called a student to the office for anything that had been said in the paper, but I did explain to the president that I felt when such disturbing statements were made in the paper, the time had come when a student of this sort should be counseled, so I called him into the office, and we talked quite at great length. I talked very firmly to him, and I let him know that I was disturbed because of what he had said.

. . . .

Q. . . . . Were these comments made as censorship, or how were they made? A. At no time in my conference have I used the word "censor" . . . .

Q. Did you at any time threaten to send Mr. Ross home? A. At the beginning, when he came into my office, I asked him if he liked it at our institution, and he said that he did, and I said, how well do you like it at our institution, and he said, I love it, and I said, well, you do not write as if you did love it. I questioned him about what I thought was a disturbing statement, and he indicated that he had written it, and I asked him where he lived, and he told me Knoxville, and I said, said, how long does it take you to get home, and he said, told me approximately three hours . . . and so I had him put his pad on the desk, and I explained to him that I was talking to him as a dean and he was talking to me as a student, not a reporter, and because of my concern about the statement, I said to him . . . you might turn your face west, because there is a possibility you will be going in that direction soon. That was my statement to him.

. . . .

A. . . . . [A]fter quite a number of minutes, he apologized for making the statements and for writing as he had written, but I was concerned particularly about the sentence I have referred to, and he apologized for making the statement and for writing the article, and during that process, I said to him, Mr. Ross, is it understood by both of us that I have not asked you for this apology, and he

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said that it was his understanding, and I repeated it, because I wanted to be sure that he felt he was under no pressure as far as I was concerned, and after he assured me that he was sorry for what he had written . . . I think that our conference ended very, very cordially . . . . (138a-41a)

When asked why he was concerned about the literature, Dean Davis said:

. . . the first thing that I was concerned about was one statement in there which said that there had been . . . a threatening of censorship, and there had been no such threat.

. . . .

A. I was very much concerned about that . . . I thought it was very unfair, because I again believe that it is my responsibility to counsel students and to encourage high standards, and when it comes to the point where one can't do that without being accused of censorship, I'm very much disturbed.

. . . .

Q. . . . . Did anything else that is included in either of these handouts concern you? A. Well, the general nature of both handouts disturbed me very much. I felt that the whole idea was designed to disrupt the functioning of the university and to adversely prejudice the students on campus. (145a-147a)

Thus by Dean Davis' own testimony, he was clearly incorrect and the Students were clearly correct in saying that there had been an attempt by the administration to censor the school paper.

His testimony also illustrates the view that student criticism

of the University was a personal attack on the administrators,[8] who were then to pass upon the culpability of the Students' words.

Joseph Garber, who wrote the first pamphlet, testified that many of the statements were intended as metaphor and satire, but that the deans seemed to take it literally. (84a)

Under questioning by the Court, Mr. Garber explicated the purpose of the leaflets:

> THE COURT: Well, if you had no factual basis for saying that the school was run by despots or that there was an administrative tyranny, what was the purpose of this language? What were you aiming at, what were you trying to do?
>
> THE WITNESS: Well, the purpose of the language, as I understand it, is simply hyperbole, to get people involved . . . .
>
> THE COURT: Were you trying to effect any particular reform, or alter some particular relationship between the students and the administration? . . . .
>
> . . . .
>
> THE WITNESS: Specifically the leaflet was . . . to bring students together and then find interested students . . . to run for campus offices . . . .

---

[8] The same view is explicit in President Culp's testimony:

> Q. Now do you believe that in this case the rights of others were interfered with? A. Yes, I certainly do.
>
> Q. Whose rights were interfered with? A. The entire institution.
>
> Q. There's a difference between integrity and peace and order. A. Perhaps semantics are involved.
>
> Q. You mean you believe since the integrity of the institution was attacked, the free expression of these students hurt others? A. It was my opinion and was my judgment that it had gone farther than free expression, the kind of charges leveled against me and the administration. (181a)

THE COURT: On a program of what? What platform?

. . . .

THE WITNESS: Increased student rights, perhaps do something about dress, do something about hours, do something certainly about food and book store and the fact that there are no students on the discipline committee, to propose and try to get real leaders. We don't have, in my estimation, at East Tennessee University, the people in student government are not real leaders.

THE COURT: You're trying to stir up the interest and to stimulate the interest of the students to run on some kind of an anti-administration platform?

THE WITNESS: Not necessarily anti-administration. I don't think reform is necessarily anti; it may well be considered pro.

. . . .

. . . [Y]ou have to realize in a mythological world, within the student myth, the administration are always the bad guys, they've got the moustaches and the black hats, they are the villains, and this is part of the game.

. . . [T]his is the—I should suspect acceptable language both in campus politics and in real life, American governmental politics. Some of these political speeches we've been hearing lately, are, if taken literally—

THE COURT: All right. (90a-93a)

Despite the University's attempts to prove the students were acting as a "part of the same transaction or plan or scheme"[9] (72a), the evidence was otherwise (see, *e.g.*, 63a, 117a).

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[9] This was apparently felt by the defense to be a necessary element of sustaining the suspension of the students who handed out only the second leaflet, which was characterized as not "near as harmful" as the first. (71a-72a) The court of appeals, however, noted only a far more tenuous nexus, that "the second piece . . . implicitly approved the first piece . . . ." (5A) The court of appeals also indicated that even without the nexus the less objectionable leaflet was sufficient basis for suspension.

Dean Davis conceded himself and the other Discipline Committee members to be simultaneously counselors to the students and their prosecutors (see 41a, 153a) (in addition, of course, to being fact finders and adjudicators). The prosecutorial function of the hearers and reviewer of the evidence was made explicit: "The charges were developed by members of the discipline committee in conference–in consultation with the president." (17a)

Although it is difficult to pin down with a precise quotation or reference, the transcript as a whole is imbued with an air of such paternalism on the part of the University and its counsel that it appears that these Students were in fact considered as schoolchildren (See, *e.g.*, 44a, 121a, 125a, 138a-40a, 178a– these examples in isolation may appear innocuous but when cumulated with the rest of the record there is a pattern demeaning to the dignity of the students; it was particularly galling to Student Garber, as an Army veteran, a student, and prospective student at a prestigious law school, 80a, 101a). The atmosphere was so pervasive that the district court must have been inevitably led into accepting the paternalistic or *in loco parentis* attitude. (See, *e.g.*, 44A.) The court of appeals readily embraced the *in loco parentis* attitude. (See 5A-6A, 8A.)[10]

Judge Celebrezze's perception of the record as a whole implicitly recognizes the aura of paternalism as producing "selective use of discretion to eliminate unflattering opinions of one's nominal superiors. (33A) This follows from his opinion, from an evaluation of the whole record that had the students

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[10] Referring to college students generally as "children" (6A) and in evaluating the fairness of the proceedings, giving significance to the fact that none of these particular students "expressed any sorrow or regret for what he had done" (8A), the court also interjects into its first amendment analysis of the students' "conduct" (6A) (nothing but pure speech was involved) the idea that the public must be shielded from criticism of its state universities, lest parents not "send their college-age children" *(id.)* there or lest the students' confidence in their teachers falter *(id.)*.

followed the same course of conduct and authored a document praising the present policies of the University administrators, and condemning the recommendations of the American Association of University Professors, no disciplinary action would have been taken. *(Id.)*

Throughout this statement, references have been made to the varying functions other than as triers of fact performed by the Discipline Committee and its members; defense counsel conceded that "they were acting in a more than judiciary capacity . . . ." (39a) Student Garber summarized the impact of this:

> . . . those who are accused by the leaflet, part of them, a small, very small part acting in judgment.
>
> Q. In other words, it is your objection that the committee was biased. A. Indeed.
>
> . . . .
>
> A. They could not help but be.
>
> . . . .
>
> THE WITNESS: I think from the beginning, Your Honor, with the people sitting on the committee hearing that were, beyond this there can be no discussion of fairness, with the biased committee sitting as it was, with the members who were taking this personally, I might add. (82a-83a) [11]

The issues differ somewhat among the various students; the following table summarizes these differences, which have been referred to in the foregoing text.

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[11] The cross-examiner's next question defines bias in a way that could seldom, if ever, allow it to be proved:

> Q. I understand your position in that regard. What I'm interested in is whether the committee members were courteous to you, whether they allowed you to make any statement you wanted to, or whether they were– A. They allowed me to make any statement I wanted to. (83a)

	Norton	Garber	Coker	Crawford	Haga	Heffner	McCall
Written notice of hearing	X	X		X	X	X	X
Number of days notice	3	3	1	3	3	proof not clear	3
Requested counsel	X	X		X	X	X	X
Counsel present						X	
Requested continuance	X	X		X	X		X
Stenographic notes of hearing	X	X		X	X	X	X
Distributed leaflet #1		X	X		X	X	X
Distributed leaflet #2	X		X	X	X	X	X

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO CONSIDER VIOLATIONS BY A STATE UNIVERSITY OF THE GUARANTEES OF FREE EXPRESSION AND PROCEDURAL DUE PROCESS ON A RECORD REVEALING VIOLATIONS IN THE SAME AREA AS THOSE INDICATED IN THE RECORD IN *JONES V. STATE BOARD OF EDUCATION, cert. granted,* 90 S. Ct. 145 (1969) (No. 731, 1969 Term), THE RECORD HEREIN ILLUSTRATING DIFFERENT ASPECTS OF THE ISSUES IN *JONES* AND ADDITIONAL PROBLEMS IN THE AREA.

Considerations applicable to the substantive first amendment and procedural due process questions presented in this case are developed in Petitioner's Brief now before this court in *Jones v. State Board of Education, cert. granted,* 90 S. Ct. 145 (1969) (No. 731, 1969 Term).[12] The record here illustrates the magnitude of the problems and the different contexts in which universities are prone to deny their students their rights of expression and procedural fairness. This record presents some of the deprivations even more starkly than does *Jones,* and some additional deprivations are present there.

I. A state university may not conformably with the first and fourteenth amendments of the Constitution of the United States, suspend students from the university for on-campus distribution of leaflets criticizing the university policies when:

(a) no interference with or disruption of the university's functioning occurred either in connection with the distribution or thereafter, the only reaction being a visit to a dean by other students who said they wanted "to get rid of" the leafleters,

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[12] This case involves East Tennessee State University, traditionally and predominantly a white institution, thus rounding out the picture presented in Petitioner's Brief in *Jones* at 44.

and there was no particularized forecast of disruption; and

(b) there was no university regulation prohibiting the activity for which the students were suspended.

A. The right to hand out non-disruptive leaflets.

1. The perversion of the "material and substantial interference" test and the need for the "clear and present danger" test.

In Petitioner's Brief in *Jones*, at 61-64, filed with this Court on November 24, 1969, concern was expressed over school officials' propensity to seize upon a single phrase from *Tinker v. Des Moines School District*, 393 U.S. 503, 514 (1969) ("reasonably have led school authorities to forecast substantial disruption of or material interference with school activities"). It was pointed out that until this phrase is clarified, the *Tinker* opinion may be of little practical significance, school officials being able to avoid it by a "nip-it-in-the-bud" technique.

Four days later, on November 28, 1969, the Court of Appeals for the Sixth Circuit handed down the opinion herein. It quoted the foregoing phrase from *Tinker* and continued:

> In the present case Dean Davis and President Culp *did forecast disturbances and they acted quickly* to prevent threatened disorders by making the charges against the inciters and holding the hearings. (6A) (emphasis added) [13]

And:

> It is not required that the college authorities delay action against the inciters until after the riot has started and buildings have been taken over and damaged. The college authorities have the right to *nip such action in the bud* and to prevent it in its inception. (7A) (emphasis added) [14]

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[13] *Cf.* Dombrowski v. Pfister, 380 U.S. 479, 487 (1965): "The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution . . . ."

[14] No phrase similar to "nip such action in the bud" appears to have been presented to the court by testimony, by the district court's remarks or findings, or in the briefs of each side.

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There was, as developed in the Statement of the Case and in Judge Celebrezze's dissent (and indeed as is apparent from the face of the majority opinion), no threat of disorder, no danger of riot, no prospect of buildings being taken over, and no incipient destruction. On the contrary, the University officials summed up their "undifferentiated fear or apprehension," 393 U.S. at 508, with such language as "in our hearts we know" (156a), and "could conceivably" (147a). [15]

Unless reversed, the court of appeals' decision stands as precedent for greater protection to symbolic expression than to the written word. [16] It distinguished *Tinker:*

> Tinker involved a few [17] high school children who did nothing except wear black armbands for a few days to publicize their objections to hostilities in Vietnam. These children did not urge a riot, nor were they disrespectful to their teachers. (6A)

2. The question of the "hecklers' veto."

The court of appeals' majority attaches significance (7A) to the incident described in the dissenting opinion as "[T]he fact that 25 students visited Dean Thomas . . . and churlishly warned him 'to get rid of this group of agitators' . . . ." (22A-23A)

Too often the first point of reference in deciding whether a student may express himself is the reaction or anticipated reaction of those who disagree. *Cf. Tinker v. Des Moines School District,* 393 U.S. 503, 509-10 nn. 3, 4 (1969).

But, "important as is the preservation of the public peace, this aim cannot be accomplished by laws . . . which deny rights created or protected by the federal Constitution." *Buchanan v.*

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[15] And of course even these fears were not expressed in the disciplinary hearings, there being no testimony against the Students.

[16] But *cf.* Butts v. Dallas Ind. School Dist., 38 U.S.L.W. 2334 (N.D. Tex, Dec. 5, 1969) where the court allowed the "forecast" doctrine to justify a ban on black armbands.

[17] This emphasis on the small number involved provides no distinction from the present case, but it does indicate a tendency to read the first amendment as providing only "a safe haven for crackpots." *Tinker v. Des Moines School District,* 393 U.S. 503, 513 (1969).

Warley, 245 U.S. 60, 81 (1917). See *Cooper v. Aaron*, 358 U.S. 1, 16 (1958). In the first amendment area:

> Participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence. *Brown v. Louisiana*, 383 U.S. 131, 133 n. 1 (1966).

Despite the clarity of these statements,

> we find courts too prone to permit a curtailment of a constitutional right of a dissenter, because of the likelihood that it will bring disorder .... It seems to me it cannot be said too often that the constitutional rights of an individual cannot be denied him because his exercise of them produces violent reaction by those who would deprive him of the very rights he seeks to assert. *Ferrell v. Dallas Independent School District*, 392 F.2d 697, 705 (5th Cir.) (Tuttle, J., dissenting), *cert. denied*, 393 U.S. 858 (1968).

The problem may become increasingly important; conservative students are beginning to be schooled in the techniques of protest to oppose demands emanating from those to their political left. See, *e.g.*, Hukari, *How to Combat Campus Radicals*, Human Events, Nov. 15, 1969, at 11.[18]

Judge Celebrezze's dissent suggests several eminently reasonable "less drastic alternatives" that could have been followed consistently with the first amendment rights of both sides. (23A) This suggests that an appropriate analysis for generalized application may be had by reference to the development of the "least drastic alternative principle" as found in cases such as *King v. Smith*, 392 U.S. 309 (1968); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (particularly the concurring opinions at 497-99, 503-07); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951). *Cf.* Ratner, *The Function of the Due Process Clause*, 116 U. Pa. L. Rev. 1048, 1086 (1968).

[18] In Butts v. Dallas Ind. School Dist., n. 16 *supra*, the "disruption" relied upon apparently was hostility toward off-campus demonstrators who favored the same cause as the unsuccessful plaintiff-armband wearers.

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This aspect of the problem of student free expression is not present in the *Jones* case and hence can be considered only upon full briefing and argument herein.

3. The nature of the speech allowable on a college campus.

The district court's findings on the nature of the leaflets are set forth below in juxtaposition with an often quoted passage from *Terminiello v. City of Chicago*, 337 U.S. 1, 4-5 (1949), with emphasis added to contrast the results:

District Court	Terminiello
That the Discipline Committee could properly have found that these documents were *abrasive, abrupt and rude* in character and that they were *calculated to arouse resentment* both on the part of the administration and on the part of the students of East Tennessee State University. (48A) (written findings)	Accordingly a function of free speech under our system of government is to *invite dispute.* It may indeed best *serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging.* It may strike at prejudices and preconceptions and have profound unsettling effects .... That is why freedom of speech, though not absolute ... is nevertheless protected against censorship or punishment, *unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.*
These documents are obviously *abrasive* in character. There is *language which is abrupt and rude and calculated to arouse resentment,* not only on the part of the administration, but on the part of the students, and *I do not see that this kind of language is at all necessary* to promote the legitimate objects of students on the campus of a university. (42A) (oral opinion)	

The court of appeals took an even more restrictive view of the quality of the speech allowable on the campus than did the district court, premising its holding on such words as "ridicule and contempt," "damaged the reputation of the University," and "beyond the dignity of most college students." (5A)

There is no attempt to reconcile these findings with the long line of first amendment jurisprudence exemplified by *Terminiello*[19] and *Cox v. Louisiana*, 379 U.S. 536 (1965); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Wood v. Georgia*, 370 U.S. 375 (1962); *DeJonge v. Oregon*, 299 U.S. 353 (1937). The lower courts' opinions establish without discussion and notwithstanding *Pickering v. Board of Education*, 391 U.S. 563 (1968), a completely different standard of speech allowable in colleges and universities.

The Students contend, consonant with the dissenting opinion, that an independent examination of the record would not support the lower courts' evaluations of the nature of the speech. More importantly, they contend that traditional first amendment concepts should apply, obviating the necessity for such independent evaluation.

Here, the case differs from *Jones* in that there the lower courts did not evaluate the quality of the speech in the leaflet that Jones allegedly handed out.

B. The complete absence of regulations is the most extreme manifestation of the evils of vagueness and overbreadth.

Considerations of vagueness and overbreadth are before the Court in Petitioner's Brief in *Jones* at 23-58. To state the problem, as the court of appeals did here (10A), in terms of "inherent authority" confuses the source of authority with its exercise. The holding is contrary to *Soglin v. Kauffman*, No.

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[19] The *Terminiello* standard has been recently applied to college speaker bans in Stacy v. Williams, No. WC 6725-K (N.D. Miss., Dec. 1, 1969) (slip opinion at 24 and n. 33).

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17,427 (7th Cir., Oct. 24, 1969) (slip opinion at 5) and *Brooks v. Auburn University*, 412 F.2d 1171, 1172-73 (5th Cir. 1969) (absence of rules is a prior restraint).

II. The procedures followed by the University in suspending students for distributing leaflets did not conform with the due process clause of the fourteenth amendment of the Constitution and did not adequately protect the students' rights under the first amendment, the equal protection clause of the fourteenth amendment, and the bill of attainder and *ex post facto* clause of article I § 9 cl. 3 of the Constitution when:

(a) the charges were vague and overbroad, alleging distribution of materials "of a false, seditious, and inflammatory nature";

(b) the University presented no evidence, thereby rendering it impossible to have proved that the materials were false, seditious, and inflammatory and placing the burden of proof on the accused;

(c) there was not an impartial tribunal in that members of the Discipline Committee (which heard the charges against the Students) also initiated, investigated, and prosecuted the charges, and said members, as well as the president of the University (who reviewed the suspensions and from whom the Committee derived its authority), also considered themselves as counselors, were the victims of the alleged action of the Students, considered matters within their personal knowledge which were either not brought out at the hearing or were only brought out in the words of the members or president themselves (thus making them witnesses as well), and they felt personally affronted by the Students' speech;

(d) there was insufficient time (three days, including the week-end, and, in one case, one day) between the notification of the charges and the date of the hearing, and a request for continuance was refused without valid grounds for the refusal;

(e) the refusal to grant a continuance also deprived the

Students of the opportunity to have counsel present or to adequately consult with counsel;

(f) an adequate transcript was not made, the Discipline Committee having advised the stenographer (the president's secretary) to use her discretion as to what to include therein; and

(g) the Students had no opportunity to or were not made aware of their right to present, confront, and cross-examine witnesses.

The Students' contention that they were denied procedural due process produced one of the most frustrating holdings of all:

> They were also given a plenary hearing in the District Court with counsel. Their contention of a denial of due process was thereby rendered moot. *Barker v. Hardway*, 399 F.2d 638 (4th Cir. 1968). (9A)

But the District Court, throughout its oral opinion, studiously abjured from giving plenary review, repeatedly refusing "to substitute its judgment for the judgment of the constituted authorities of the institution . . ." (36A), and saying that "I might independently reach different conclusions and I may not, but that is not my inquiry, that is not my responsibility." (41A)

The due process right to definite charges may appropriately be considered in light of the principles applicable to indictments, one of the functions of an indictment being to insure enjoyment by the accused of "the right . . . to be informed of the nature and cause of the accusation . . ." *U.S. Const.* amend. VI. *Russell v. United States*, 369 U.S. 749, 761 (1962). A statute prohibiting distribution of "false, seditious, and inflammatory literature" would fail any first amendment, vagueness, or overbreadth test. A fortiori, such a charge must fail, because standards of specificity for indictments are higher, particularly where generic terms are used. *Id.* at 765.

In accordance with established first amendment doctrine, the

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standards of specificity should rise another notch when speech is the object of the charge. As said in *United States v. Lattimore*, 127 F. Supp. 405, 407 (D.D.C.), *aff'd by equally divided court*, 232 F.2d 334 (D.C. Cir. 1955):

> [W]hen the charge in an indictment is in the area of the First Amendment, evidencing possible conflict with its guarantees of free thought, belief and expression, and when such indictment is challenged as being vague and indefinite, the court will uphold it only after subjecting its legal sufficiency to exacting scrutiny.

Most of the due process issues presented here–definite charges, decision based on the evidence, time to prepare, and presentation, confrontation and cross-examination of witnesses –have been resolved in the Students' favor in other circuits. See, *e.g.*, *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); *Esteban v. Central Missouri State College*, 277 F. Supp. 649 (W.D. Mo. 1967).

The rights to counsel (or at least to an advisor) and to a transcript [20] are not so well settled, clear-cut rationales being generally lacking in the conflicting cases collected in Van Alstyne, *The Student as University Resident*, 45 Denver L.J. 582, 593 n. 27, 594 n. 32 (1968).

Presumably no court would explicitly deny the right to an unbiased tribunal, but explicit admissions of conscious bias will be rare. The problem, then, is standards of proof of latent, presumptive, inherent, or unconscious bias. The record here, with the Discipline Committee's members' admissions of their predilections, consideration of their personal knowledge of key facts and their multiple functioning, provides a good vehicle for considering these problems.

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[20] The emergence of the tape recorder as perhaps more common on the campus than the blackboard provides an efficient and inexpensive method for accurately recording the proceedings.

CONCLUSION

A writ of certiorari should be granted to consider the problems of the rights of students presented in this case, either in connection with or as sequel to *Jones v. State Board of Education, cert. granted,* 90 S. Ct. 145 (1969) (No. 731, 1969 Term). It should be noted that, regardless of the ultimate decision in *Jones,* the court of appeals' decision herein will appear to retain precedential value because the opinion does not purport to rely on the same court's earlier decision in *Jones* and because of the existence of differing issues and differing presentations of other issues.

Respectfully submitted,

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APPENDIX

FILED
NOV 28 1969
CARL W. REUSS, Clerk

No. 19107

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MARIETTA NORTON, OSCAR HEFFNER, RICHARD CRAWFORD, JOSEPH GARBER, DAVID COKER, GEORGE BALL, ROBERT McCALL AND MIKE HAGA,
Plaintiffs-Appellants,

v.

THE DISCIPLINE COMMITTEE OF EAST TENNESSEE STATE UNIVERSITY, MACK DAVIS, ELLA ROSS, DORMAN STOUT, WILLENE PAXTON, JOAN DRESSEL, JOHN MERCER, PHIL THOMAS, EAST TENNESSEE STATE UNIVERSITY, DELOS P. CULP AND THE STATE BOARD OF EDUCATION OF AND FOR THE STATE OF TENNESSEE,
Defendants-Appellees.

APPEAL from United States District Court for the Middle District of Tennessee, Nashville Division.

Decided November 28, 1969.

Before WEICK, O'SULLIVAN and CELEBREZZE, Circuit Judges.

WEICK, Circuit Judge. Appellants, students of East Tennessee State University, were suspended by the University's Discipline Committee after a hearing on charges of distributing on the campus "material of a false, seditious and inflammatory nature." This material was calculated to cause a disturbance and disruption of school activities and to bring about ridicule

of and contempt for the school authorities. The students perfected an administrative appeal to the President of the University, who upheld the decision of the Discipline Committee.

The students then instituted the present action in the District Court under the civil rights statutes for a mandatory injunction to compel their reinstatement, claiming that their constitutional rights had been denied them. The District Judge, who had previous experience in cases of this type[1], granted them an evidentiary hearing. Each of the appellants, the Chairman of the Discipline Committee, and the President of the University testified. A stipulation was admitted in evidence containing the alleged inflammatory literature and an admission that each of the appellants distributed one or both pieces of it. Transcripts of the hearings conducted by the Discipline Committee were received in evidence. The District Judge at the conclusion of the hearing rendered an oral opinion and adopted findings of fact and conclusions of law, in which he denied the injunction. This appeal followed.

Two pieces of the alleged inflammatory literature were distributed, one on May 28, 1968, and the second on May 30, 1968, the latter being only one day before the beginning of final examinations. The Discipline Committee took immediate action and sent three-day notices of a hearing to be held on the charges to all of the students who had distributed the literature except two students who received only one day's notices. Copies of the offensive literature are appended hereto.

Dean Davis, Chairman of the Discipline Committee, testified:

> "I felt that the whole idea was designed to disrupt the functioning of the University and to adversely prejudice the students on the campus. I felt that it . . .

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[1] *Jones* v. *State Board of Education*, 279 F.Supp. 190 (D.C.M.D. Tenn. 1968), *aff'd*, —— F.2d —— (6th Cir. 1969); *Knight* v. *State Board of Education*, 200 F.Supp. 174 (D.C.M.D. Tenn. 1961).

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that the contents of both handouts could conceivably cause an eruption on the campus which would disturb the functioning of the University."

Dr. Culp, the President of the University, testified:

"Q Dr. Culp, did you think that these handouts tended to disrupt the shool program and interfere with the education of people who were concerned about acquiring an education?

"A Yes, I had very definite fears that we might have serious consequences on the campus."

The District Judge was of the view that the inflammatory nature and disruptive characteristics of the literature appeared on its face. He made the following finding of fact:

"XIV

"That the Discipline Committee could properly have found that these documents were abrasive, abrupt and rude in character and that they were calculated to arouse resentment both on the part of the administration and on the part of the students of East Tennessee State University.

"XV

"That at least one document is susceptible of the interpretation that the writer of the article is encouraging demonstrations similar to those which had occurred on other campuses throughout the country; and the article can be reasonably and logically construed to mean that the writer of the article was calling upon the students of East Tennessee State University to engage in the same kind of conduct and activity which had occurred at Columbia University and elsewhere." (202a-203a)

This finding would appear to be supported by the following excerpt from the first sheet:

"And how has the ETSU student body reacted: Have they precipitated a revolution like French students? No. Have they brought about an entirely new and liberal administration like Polish students? — No. Have they been the forerunners of a new democratic spirit like Czech students? — No. Have they seized buildings and raised havoc until they got what they were entitled to like other American students? — No. What then have the ETSU students done? They have sat upon their rears and let the administration crap upon their heads, thats what.

That's right folks, in case you'd not noticed, ETSU students are in the vast majority apathetic — they open their mouths only to yawn, life [sic] their arms only to stretch, and like unto L'il Abner's Smoes, exist only to serve those who would take advantage of them.

Well, Smoes, what have you to look forward to next year? Maybe the administration will buy some Dean's turnip patch for ninety grand. Maybe all the girls will be required to wear chastity belts (the keys to be kept on reserve at the library — check 'em out for an hour at a time). Maybe social hours will be made applicable to males as well as females. Maybe . . . Maybe . . . Maybe . . .

Maybe students will get some sense and learn that this should cease and that the only way to see that it does is to stand up and fight. Maybe students will learn that the Supreme Court has declared that young people do not sacrifice their citizenship and all rights and privileges therewith by enrolling in a university. Maybe students will learn that no matter what the despots who run this school say, students have the constitutional right to protest, demonstrate, and demand their rights; that women students may not constitutionally be campussed; that students may damned well wear what they want and say what they please. And maybe, just maybe, they will discover that there are student leaders, or-

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> ganizers to rally around so as to assault the bastions of administrative tyranny. Maybe students will learn that at least. And remember that when the time comes to fight for what you are justly entitled to, that if you refuse to come along then you have no justification whatsoever for ever complaining again. When you are called to protest and you sit back on your butt, then, baby, that means that whatever the administration does is OK with you. When we move against them, remember, like the man says, 'Put up or shut up.'" (18a)

The language, referring to their fellow students, "Have they seized buildings and raised havoc until they got what they were entitled to like other American students", was obviously intended to call their attention to campus disturbances around the country, and would include such universities as Columbia, Berkeley, Harvard, Cornell, Ohio State and Kent State. The students were urged to "stand up and fight" and to "assault the bastions of administrative tyranny." This was an open exhortation to the students to engage in disorderly and destructive activities.

The University administration was referred to with an obscenity and called "despots". This vicious attack on the administration was calculated to subject it to ridicule and contempt, and to damage the reputation of the University.

The reference to "chastity belts" for girls is a crude, vulgar remark offensive to women students and beyond the dignity of most college students to make.

Reliance was made on the Supreme Court for declaration of the constitutional rights of the students to "damned well wear what they want and say what they please." In our opinion such reliance is misplaced. The students have no constitutional right to misbehave on the college campus.

In the second piece, which impliedly approved the first piece, the school administration was referred to as a "problem child"; and stated that it is a crime for the student to shelter by their silence that "problem child", and that the

students should now reprimand "our misguided child" and educate him. "We must now educate the educators" and "teach them the lesson of reality . . . although they may be shocked by it."

Ordinarily students go to college to acquire an education, but these students apparently want to educate the teachers.

It would indeed be difficult to maintain discipline on the campus of an institution of higher learning if conduct of this type were tolerated. We would doubt that parents would send their college-age children to such an institution if they knew that the philosophy as contained in the literature was taught or sanctioned there. We cannot imagine that a student could have confidence in the teachers in a university such as the literature portrays.

Appellants contend that distribution of the two handouts was privileged under the First Amendment to the Constitution as an expression of free spech unaccompanied by acts of violence. They rely principally on *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969), and cases cited therein. *Tinker* involved a few high school children who did nothing except wear black arm bands for a few days to publicize their objections to hostilities in Vietnam. These children did not urge a riot, nor were they disrespectful to their teachers.

Mr. Justice Fortas, who wrote the opinion in *Tinker*, was careful to mention:

> "As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred." *Id.* at 514

In the present case, Dean Davis and President Culp did forecast disturbances and they acted quickly to prevent threatened disorders by making the charges against the inciters and holding the hearings.

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Burnside v. *Byars*, 363 F.2d 744 (5th Cir. 1966), cited in *Tinker*, enjoined high school authorities from enforcing a regulation forbidding students from wearing "freedom buttons" with the words "One Man One Vote" and "SNCC" thereon. There was no proof that regular activities of the school were hampered.

On the same day of the decision in *Burnside*, however, the Fifth Circuit reached an opposite conclusion in *Blackwell* v. *Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966), where the wearing of such buttons "created a state of confusion, disrupted class instruction, and resulted in a general breakdown of orderly discipline."

After distribution of the first piece in the present case, twenty-five students went to the office of Dean Thomas and wanted to get rid of this group of agitators.

It is not required that the college authorities delay action against the inciters until after the riot has started and buildings have been taken over and damaged. The college authorities had the right to nip such action in the bud and prevent it in its inception. This is authorized even in criminal cases.

As well stated by Chief Justice Vinson in *Dennis* v. *United States*, 341 U.S. 494, at 509 (1951):

> "Obviously, the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required."

In *Schenck* v. *United States*, 249 U.S. 47, at 52 (1919), Mr. Justice Holmes said:

> "We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But

> the character of every act depends upon the circumstances in which it is done. *Aikens* v. *Wisconsin*, 195 U.S. 194, 205, 206. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 439. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

Nor does this case involve lack of due process which was denied in *Dixon* v. *Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961), and *Knight* v. *States Board of Education*, 200 F.Supp. 174 (D.C.M.D. Tenn. 1961). Three-days' notice of hearing was given to all except two students, and one of them appeared with his lawyer. On the day of the hearing some of the students asked for a postponement to get counsel, but the request for a continuance was denied because the Committee was of the view that they had had a reasonable opportunity to obtain counsel if they really wanted them. The District Judge held that the question whether a continuance should be granted was discretionary with the Committee, and he found no abuse of discretion. He was motivated largely by the fact that the inflammatory nature and disruptive characteristics of the literature appeared on its face and it was unnecessary to obtain evidence to prove that fact. We agree.

At the hearing before the Committee each student was given full opportunity to state his views. The President of the University was impressed by the fact that none of the students expressed any sorrow or regret for what he had done. None of the students gave any reason for not taking

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up grievances with the Committee established to hear them, namely, the Student-Faculty Liaison Council.

Furthermore, each student was given an opportunity to obtain counsel in his administrative appeal to the President, but no one availed himself or herself of that right. They were also given a plenary hearing in the District Court with counsel. Their contention of a denial of due process was thereby rendered moot. *Barker* v. *Hardway*, 399 F.2d 638 (4th Cir. 1968).

Finally, it should be emphasized that appellants were not expelled from the University, but were merely suspended. The difference between expulsion and suspension was explained by Dr. Davis as follows:

> "I continue to hear reference to the matter of expel or expulsion. We at no time even mentioned the word expel or expulsion.
>
> "The plan of suspension is a restraint from enrollment which gives those of us who are concerned with the administration affairs time to reflect and to study what has happened. It also gives the student time to reflect and to study, and to appear before the committee then so that the committee and the student can, if possible, come to an agreement about future attendance.
>
> "There is a difference in the meaning of suspension and expulsion." (159a)

The District Judge at the close of the hearing suggested that the University give hearings on applications for reinstatements. The record does not reveal that any such applications were made. The students are apparently insistent that they had the right to do what they did and they are going to stand by it.

In our judgment there is no basis for federal interference with the disciplinary procedures of the State University in this case.

We agree with the District Court that the charges that

the literature was false and inflammatory, was sufficiently definite.

It was not necessary to have a specific regulation providing for disciplinary action for the circulation of false and inflammatory literature. The University had inherent authority to maintain order and to discipline students. We do not believe that there is a good analogy between student discipline and criminal procedure.

Affirmed.

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EXHIBIT A

STUDENTS ARE PEOPLE TOO

[First Piece]

Its been a long quarter, hasn't it? And an interesting one too. Too interesting in fact. This has been a quarter wherein the administration spent $94,000 to buy a lousy half-acre of land (rumored to belong to a near relative of a prominent Dean); a quarter wherein the administration has refused an opportunity to advance the school's athletic status (and God knows, it needs it) by rejecting membership in the Southern Conference; a quarter wherein the administration has forbidden girls to wear the latest fashions (the threat of a riot overturned that ruling); a quarter wherein the administration fired some poor student from his job at the library because he grew a beard; a quarter wherein mandatory TOTC [sic] has continued unchallenged (the school gets paid so much money perhead by the Army, so, son, like it or not there is a price on your head); a quarter wherein the bookstore monopoly has persisted in its blatant piracy (and blew a fortune putting out a propoganda sheet), a quarter wherein the cafeteria fare has progressively worsened; a quarter wherein the administration seriously threatened censorship of the school newspaper (all those filthy pictures); a quarter wherein women's social rules were maintained at a level of liberality that was old when Queen Victoria was young; a quarter wherein the campus law (rent-a-cop) was permitted to continue carrying guns (caution: your local copy is armed and may be dangerous); a quarter where the administration bureacracy achieved new heights of rudeness, inefficiency, and intolerance. Yes — an interesting quarter.

And how has the ETSU student body reacted: Have they precipitated a revolution like French students? No. Have they brought about an entirely new and liberal administration like Polish students? — No. Have they been the fore-

runners of a new democratic spirit like Czech students? – No. Have they seized buildings and raised havoc until they got what they were entitled to like other American students? – No. What then have the ETSU students done? They have sat upon their rears and let the administration crap upon their heads, thats what.

That's right folks, in case you'd not noticed, ETSU students are in the vast majority apathetic – they open their mouths only to yawn, life [sic] their arms only to stretch, and like unto L'il Abner's Smoes, exist only to serve those who would take advantage of them.

Well, Smoes, what have you to look forward to next year? Maybe the administration will buy some Dean's turnip patch for ninety grand. Maybe all the girls will be required to wear chastity belts (the keys to be kept on reserve at the library – check 'em out for an hour at a time). Maybe social hours will be made applicable to males as well as females. Maybe . . . Maybe . . . Maybe . . .

Maybe students will get some sense and learn that this should cease and that the only way to see that it does is to stand up and fight. Maybe students will learn that the Supreme Court has declared that young people do not sacrifice their citizenship and all rights and privileges therewith by enrolling in a university. Maybe students will learn that no matter what the despots who run this school say, students have the constitutional right to protest, demonstrate, and demand their rights; that women students may not constitutionally be campussed; that students may damned well wear what they want and say what they please. And maybe, just maybe, they will discover that there are student leaders, organizers to rally around so as to assault the bastions of administrative tyranny. Maybe students will learn that at least. And remember that when the time comes to fight for what you are justly entitled to, that if you refuse to come along then you have no justification whatsoever for ever complaining again.

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When you are called to protest and you sit back on your butt, then, baby, that means that whatever the administration does is OK with you. When we move against them, remember, like the man says, "Put up or shut up."

PLEASE SEAL AND STAMP ANY CORRESPONDENCE TO BOX 9527 ETSU

EXHIBIT A-I

"STUDENTS ARE PEOPLE TOO"

"Congress must not interfere with freedom of religion, speech or press, assembly, and petition. Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the people peaceably to assemble, and to petition the government for a redress of grievances." (first amendment, U. S. constitution)

These aged words are a reality to most American people. "Students are people too, American people." These are young words that should be a reality. We find the administration at E. T. S. U. denying the reality of one group of these words by certain rules, regulations and policies. For our purposes we will put these unjust rules, regulations and policies into two broad categories. The first are those that restrict our personal freedom as "American people". The second being those that deny us the right to openly descent [sic] disagree with the first.

Even as we write this we are in danger with the school administration. Is this just, denying American people rights that are clearly stated in the first amendment of the constitution? By restricting our personal freedom and denying us the right of open descent [sic] about this, the administration of E. T. S. U. is saying that we are not "American people", and to those principles shall this publication be devoted.

•••••THE PRESIDENTS DOOR IS ALWAYS OPEN BUT HIS MIND IS CLOSED•••••
"EXTRACTS FROM THE STUDENT BILL OF RIGHTS. AAUP

EXHIBIT A-II

Academic institutions exist for the transmission of knowledge, pusuit of truth, the development of students and general well being of society.

1. Freedom of Access to Higher Education

A. Protection of freedom of expression — student is free to express any opinion in the classroom

B. Protection against improper academic evaluation — the student should be graded according to academic achievement and never should his grade be influenced by prejudice

C. Protection against improper disclosure — no information regarding student views, beliefs, or political associations should be released by the institution without the consent of the student

II. Student

A. Freedom of Association — student should be free to organize and join associations to promote common interests of members.

1. Membership, policies and actions of the organization should be determined by vote of members.

2. If an advisor is required the members should choose the advisor and the advisor should be free only to advise the organization.

B. Freedom of Inquiry and Expression

1. Students should be free to discuss any question that interest them and to express opinions publicly and privately

2. The student organization should be free to invite and hear anyone they may choose.

C. Student Participation in Institutional Government — stu-

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dents should be free to express opinions in regard to institutional policy. The students should also have a clearly defined means of participating in formulative and application of institutional policy affecting academic and student affairs

D. Student Publications

1. Student press should be free from censorship and editors should be free to develop their own editorial policies and news coverage.

2. No editor should be removed for any editoral [sic] comment

Off-Campus Freedom of Students

A. Exercise of Rights of Citizenship — All students have rights both as citizens and as members of the academic community

B. Institutional Authority and Civil Penalties — anytime a student has any trouble with the civil authority the institution should aid the student. No civil action should influence the institutions relation with the student.

IV. Procedural Standards in Disciplinary Proceedings

A. Investigation of Student Conduct — no institution official has the right to search a student's place of residence without a search warrant. In the case of institution dorms the institution should have to submit an application stating what the institution is searching for and why.

B. Status of Student Pending Final action — In a case in which a final decision has not been made. The institution should allow the students to practice all the rights he normally has

EXHIBIT A-IV

[Second piece]

STUDENTS ARE PEOPLE TOO

Students of ETSU:

Mr. Oscar Heffner was questioned by Deans Thomas, Ross, and Davis May 28 concerning his alleged participation in

the publication "Students are People Too." The publication contained several complaints about administrative policy concerning students' rights and privileges. The administrative position appears to be that no student has the right to distribute free literature on campus. The University Disciplinary Committee, which seats no students, met May 28. Mr. Heffner was unable to attend the meeting. Today, May 29, Mr. Heffner met with the appropriate Deans concerning his status at the University. Mr. Heffner was charged with distributing the publication and with attempting to incite students to riot. He will meet the Committee tomorrow, May 30.

Students' rights are at stake here. Any student has the same Constitutional rights as any other citizen of the United States, and he should be allowed to exercise his rights.

It is a mistake to hide truth from a child. To deny him reality is to cheat him. For when the time comes that he must meet and deal with reality, it will destroy him. It is a crime to shelter a child and to leave him unprepared. It is precisely this crime that we as students in this university are guilty of.

You see, we have a problem child. We have sheltered our administration with our silence. Although we will claim the administration as no offspring of ours, we are in a similar situation. We have allowed this administration to build a false ego; we have allowed them to think that we approve of their childish games.

We must now reprimand our misguided child. It is time to tell the administration the truth. In those hollow halls the administrators have long sat believing themselves to be "Educators." In playing this game they believe that unerring judgment comes only after many years rather than after much thought. It is with this false wisdom that they pass judgment and regulations on us. And we have followed this

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"wisdom" rather than crush the pride they hold in being dictators.

We must now educate the "educators." We must teach them the lesson of reality and allow them to know the truth, although they may be shocked by it.

The lesson is:

1. They are not the rulers and we the ruled. We are equals. We do not follow their arbitrary decisions. We work together to arrive at decisions.
2. Their "wisdon" [sic] is false and their outlook is narrow.
3. We will not longer allow this ignorance to persist. If this insult to our position continues, we will calmly and intelligently exercise our power.

This lesson can be taught very simply by telling the administration these three points and by refusing to play their game any longer. This may be a cruel, possibly even tramatic, jolt to them, but it will be best for them in the long run.

So let us set about our task and teach this misguided child the facts of life. If we do, there is a good chance the child will mature into a rational, intelligent ADULT; if we don't, the creature will surely grow into a hungry, howling monster.

(SGD) Robert L. McCall

CELEBREZZE, Circuit Judge, dissenting: In upholding the indefinite suspension, and the denial of the injunction, the majority apparently relies upon three grounds:

First, that there was sufficient evidence that the distribution of leaflets by the students would probably lead to an eruption or riot on campus that the University was justified in disciplining these students with indefinite suspensions, *Schenck* v. *United States*, 249 U.S. 47, 52 (1919).

Second, that there was sufficient evidence that the distribution of the leaflets by the students would create a substantial and material interference with the normal activities of East Tennessee State University that the University was justified in disciplining these students with indefinite suspension, *Tinker* v. *Des Moines School District*, 393 U.S. 503, 511 (1968).

Third, that the University had inherent authority to discipline by suspending indefinitely those students who engage in peacefully handing out leaflets containing false and inflammatory statements.

I believe that the pamphleteering in the instant case was protected First Amendment activity. Therefore, I dissent on all three grounds.

I

I do not agree with the majority that the record contains sufficient evidence of a probable eruption on campus to validate the University's denial of the students' constitutional rights to engage in the peaceful distribution of handbills.

Although pamphleteering involves the conduct of distributing leaflets, it is afforded the broad First Amendment freedoms of speech and of the press. *See Marsh* v. *Alabama*, 326 U.S. 501 (1946); *Jamison* v. *Texas*, 318 U.S. 413 (1943); *Schneider* v. *State*, 308 U.S. 147 (1939); *Lovell* v. *Griffin*, 303 U.S. 444 (1938). Such First Amendment rights, applied in light of the special characteristics of the campus environment, are available to students and teachers participating in

conduct akin to "pure speech". Indeed, the United States Supreme Court has emphasized that "in the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views". *Tinker* v. *Des Moines School District*, 393 U.S. 503, 506, 511 (1969). *See Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957); *West Virginia* v. *Barnette*, 319 U.S. 624, 637 (1943). Hence, full First Amendment protection — subject to the usual First Amendment qualifications — applies to both teachers and students and must be a "vigilant[ly] protect[ed] constitutional freedom . . . nowhere more vital than in the community of American schools." *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960). *See Epperson* v. *Arkansas*, 393 U.S. 97 (1968); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967); *Meyer* v. *Nebraska*, 262 U.S. 390, 402 (1923).

Limitations on the scope of the First Amendment Free Speech Clause have been characterized in two ways: First, qualifications as to time, place and manner; and second, qualifications for the protection of the rights of others and for the prevention of actual or probable material interference with legitimate state interests.

With regard to the first class of qualifications, this record nowhere suggests that the time, place, or manner of speech used by the students supplies any basis for the disciplinary suspensions they received, notwithstanding a very broad power of the State to regulate non-discriminatorily such incidents of speech. The students did not form a cordon across the street or impede pedestrians who did not accept a tendered leaflet. *Schneider* v. *State*, 308 U.S. 147 (1939) (dictum). Leaflets were not tendered on a door-to-door basis late at night or early in the morning. *See Martin* v. *City of Struthers*, 319 U.S. 141 (1941). Nor was the distribution accompanied by loud and raucous noises such as those from sound trucks or amplifiers. *Kovacs* v. *Cooper*, 336 U.S. 77 (1949).

The cautions of the United States Supreme Court in *Cox* v. *Louisiana*, 379 U.S. 536, 554 (1965):

> "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any public time."

were heeded by the students on the facts of this case. *See Adderley* v. *Florida*, 385 U.S. 39 (1966); *Cox* v. *New Hampshire*, 312 U.S. 569 (1941). The pamphlets were distributed when neither student activity nor classes were scheduled so that students would have a fuller opportunity to prepare for examinations. The places of distribution were various customary spots on the University campus at which students generally have circulated handbills and other information. The manner of distribution was equally unobjectionable. There are no indications of pamphlets being foisted upon unwilling students or of any disturbance whatsoever, even when some leaflets were slipped beneath dormitory doors. Thus, the record indicates that neither the time, nor the place nor the manner of the students' pamphleteering caused even the slightest hint of probable or actual disruption.

The second limitation on the First Amendment's broad grant of protective activity is that of protecting the legitimate interests of the state from actual or probable material interference. Clearly, if such interference reached the proportions of an actual or probable campus eruption or riot, the speech initiating such a state of affairs could be proscribed. As Mr. Justice Holmes observed in *Schenck* v. *United States*, 249 U.S. 47, 52 (1919), First Amendment guarantees of speech are qualified by the context in which the conduct or speech occurs:

> "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the

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> effect of force. *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 439. The question in every case is whether the words used are used in such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

There is inadequate evidence in the record before us to sustain the majority's finding that there was any constitutionally significant degree of likelihood of eruption or riot based on the *Schenck* standard.

It is true that the Disciplinary Committee of East Tennessee State University, as the District Court found, determined that the leaflets in question were "of a potentially disruptive character"; and that the President of the University similarly found that these leaflets "very probably would have a disruptive effect."[1] These findings are entitled to little independent weight on appeal. In similar cases involving First Amendment rights, the United States Supreme Court has repeatedly affirmed the responsibility of the judiciary to in-

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[1] However, the actual testimony of Dean Davis (Chairman of the Discipline Committee) and Dr. Culp (President of the University) was less damning than the District Court's characterization of their testimony — to-wit, that the leaflets would "very probably" have a disruptive effect. Dean Davis stated at one point that the handouts "could conceivably" cause an eruption on campus; and he cited only his awareness that other students disagreed with the contents of the pamphlets and that Spring is the time of the year student discipline problems reach a crescendo. Dr. Culp was similarly unpersuasive in adducing evidence from which this Court could find that danger of a disruption was very probable:

> "Q. Dr. Culp did you think that these handouts tended to disrupt the school program and interfere with the education of people who were concerned about acquiring an education?
>
> "A. Yes, I had very definite fears that we might have serious consequences on the campus.
>
> "Q. Now let me ask you were there any disturbances or were there any threatened as far as your knowledge is concerned?
>
> "A. I wouldn't claim anything that happened as a disturbance really, nor would I classify it as a threat. Now I would have to say this, in talking to a number of students, there were suggestions of possible difficulty of great magnitude. I couldn't truthfully say it was a threat as such."

dependently review the record by looking beyond conclusory labels to determine whether there is sufficient evidence to support administrative findings of "clear and present danger" to a substantive state interest. *See Tinker* v. *Des Moines School District*, 393 U.S. 503, 509, 514 (1968); *Pickering* v. *Board of Education*, 391 U.S. 563, 578-79 (appendix to opinion of the Court) (1967); *New York Times* v. *Sullivan*, 376 U.S. 254, 285 (1964); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Norris* v. *Alabama*, 294 U.S. 587 (1935). An independent review of the record is necessary, where, as here, the original fact finding bodies functioned simultaneously as counselor, fact-finder and prosecutor. Moreover, in the instant case the committee members and the President took personal affront to some of the information contained in the pamphlets and considered themselves victims of the students' actions. *See Pickering*, 391 U.S. at 579; *In Re Murchison*, 349 U.S. 133 (1955); *Tumey* v. *Ohio*, 273 U.S. 510 (1927).

The record reveals no grounds from which any neutral body could reasonably determine that there existed at any time on the East Tennessee campus an actual or probable danger of eruption so as to breach the standard of *Schenck* and its progeny.[2]

The majority points to two areas in the record to support its contention that an eruption was probable: (1) Twenty-five students visited the Dean's office after the distribution of the first pamphlet and "wanted to get rid of this group of agitators;" and (2) the documents themselves incited to a state of affairs in which actual disruption was probable.

(1) The fact that 25 students visited Dean Thomas after the first distribution and churlishly warned him "to get rid of

[2] Admittedly, there is some evidence that these documents were inflamatory on their face, calculated to arouse the resentment of some teachers and students, and — perhaps — even false. To the extent that such speech or conduct is unprotected activity it will be considered later in this dissent. Presently, I am concerned with the majority's holding that there existed a clear and present danger of disruption on campus which could be nipped in the bud under the *Schenck* standard.

this group of agitators" is not significant evidence of a clear and present danger of a campus disruption. In such a situation the Dean could surely have informed the 25 students that the University would not sanction vigilante groups of students determining what ideas and which students they shall permit to speak and which they shall "get rid of." The Dean might well have suggested that the 25 students print up their own pamphlet or write a letter to the University's daily newspaper expressing their consternation at the views of the distributed literature. With so many less drastic alternatives open, the University should not have abridged the rights of students expressing unpoplar and controversial ideas so long as fears of possible violence from the 25 dissenting students could have been so easily abated. *Tinker* v. *Des Moines School District*, 393 U.S. 503, 508 (1969); *Whitney* v. *California*, 274 U.S. 357, 373, 377 (1927) (Justices Brandeis and Holmes, concurring). *See also, Gregory* v. *Chicago*, 394 U.S. 111 (1969) (anticipated unruly conduct of bystanders is no justification for the arrest of peaceful civil rights demonstrators).

The United States Supreme Court has noted that speech, especially on subjects of interest to the body politic, may be legitimately fashioned to provoke and stimulate debate. In *Tinker*, 393 U.S. at 508 the Court noted:

> "The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello* v. *Chicago*,

> 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom – this kind of openness – that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society."

The United States Supreme Court has been hesitant to proscribe speech, if less drastic, readily available alternatives are present, as they were in the situation presented to Dean Thomas by the 25 students. As Justices Brandeis and Holmes observed in concurrence, while upholding a conviction for conspiracy to commit certain serious crimes:

> "[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence." *Whitney* v. *California*, 274 U.S. at 377.

(2) The documents themselves are cited by the majority as constituting evidence that there was a clear and present danger of disruption. *Schenck* v. *United States*, 249 U.S. 47, 52 (1919). I believe that the language of the pamphlets is abrasive, abrupt, rude, possibly even false and inflammatory;[3] however, *Schenck* requires an evidentiary showing of imminent disruption before such language can be considered a clear and present danger. In *Chaplinsky* v. *New Hampshire*, 315 U.S. 368 (1942), the United States Supreme Court upheld a state statute which had been construed to limit public speak-

[3] While the majority opinion characterizes reference to "chastity belts" and "crapping on their heads" as obscene, clearly the purported obscenity of the documents is not a ground of the majority opinion. In any event, those references when read in the context of the "pamphlets as a whole" are not obscene. *Roth* v. *United States*, 354 U.S. 476 (1957).

ing where the speech directly tended to incite the listener to acts of violence. The Court stated:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of peace." 315 U.S. at 571-72.

While the documents distributed by the students were coarse in their political satire and hyperbole, there is no evidence that their nature was such as to "incite" or "cause a breach of peace by provoking the person addressed to acts of violence." Indeed, there was no evidence of actual disruption or threat of disruption aside from the aborted "heckling veto" of 25 students the day after the distribution of the first pamphlet. Furthermore, the pamphlets' abrasive language is confined to the preamble and concluding portions of a document otherwise advocating a set of students' rights sanctioned by the prestigious American Association of University Professors. *See Developments in the Law, Academic Freedom,* 81 HARV. LAW REV. 1045, 1105-12 (1968). In fact, uncontroverted testimony of the students at the District Court hearing established that the first pamphlet was written in angry response to an alleged incident of censorship of the student newspaper, that its purpose was to inform the students of actions of the University of which the writer and others were critical, to congeal student opinion in support of reform, to "bring [students] together, and then find interested students to run for campus offices . . . student body president . . . student senate." The body of the first pamphlet considered such matters of topical concern to students as rights of free press for student publications, student participation in institutional government, and procedural

standards in disciplinary proceedings. Similarly, the second pamphlet was motivated by topical campus considerations. The University considered disciplining one of the students in connection with the first pamphlet; and so, the second pamphlet was distributed "to inform the students about what had happened, and to help formulate a public opinion." As one student disarmingly said in the District Court:

> "This is quite a legitimate way of doing this, don't you think?"

The majority points to only one passage that could be reasonably and logically construed ("is susceptible of" to quote the District Court) to mean that the writer was encouraging or advocating the same kind of conduct that had occurred at Columbia University in the Spring of 1968. However, writing which may or may not be construed as "encouraging" unlawful activity does not constitute a "clear and present danger", particularly when the entire context of the document concerns matters of topical student concern. In *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), the United States Supreme Court reversed the conviction of a Ku Klux Klan leader under Ohio's Criminal Syndicalism Statute, for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform," to-wit:

> "[T]he constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. at 447.

Given the topical character of the subject matter and the context of the time, place, and manner in which the pamphlets were distributed, even the single statement susceptible of being read as "encouraging" unlawful activity should only be re-

garded as "advocacy", not "incitement". These pamphlets were not distributed in any angry crowd or in the wake of prior disturbances, but on a campus of presumably tempered and rational students. Imminent lawless action, such as occurred at Columbia, was not a clear and present danger on the facts and evidence of this case.

II

In its second general ground the majority indicates that if the pamphleteering of the students created a material and substantial interference with the normal activities of the University, then it was not privileged. *Tinker* v. *Des Moines School District*, 393 U.S. 503 (1969). I agree.[4]

I cannot agree, however, that there is sufficient evidence in the record of the instant case to justify the conclusion that the pamphleteering created a probable or actual material and substantial interference with any of the normal activities of the University.

The majority, for reasons of its own, chose to analogize the facts of the instant case to those of *Blackwell* v. *Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966), in which there was a total breakdown of good order and discipline in the school's operations. I believe the evidentiary record of the instant case is strikingly analogous to that of *Tinker* in which the United States Supreme Court found the students' conduct to be protected by the First Amendment.

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[4] Campus officials must have the authority to handle day-to-day disciplinary problems and prevent any material interference with the normal activities of the institution. For example, students could be prohibited from speaking without permission in classrooms because such "free speech" would materially interfere with the rights of other students to learn and with the normal activity of teaching. Furthermore, such a proscription would not be aimed at prohibiting any particular expression, but rather would apply generally to speech in a classroom. Similarly, plagerism or falsification of a scholarship application could well be proscribed because such "free expression" materially interferes with the educational standards of the institution, and prejudices the rights of other students in their educational opportunities. Such a regulation, also, does not run into the danger of prohibiting any particular opinion.

The record in *Tinker* revealed no less disruption than does the record in the instant case. In *Tinker*, the record revealed that "disputes" caused by 13-year-old Beth Tinker's armband demonstration "practically wrecked" a lesson period in mathematics; that the armbands created dissention among the students, some of whom chose to tease the Tinker children, while others chose to protect them; and, finally, armband wearing in both the junior and senior high schools took the students' minds off their classwork and directed them to thoughts about the highly emotional subject of the Vietnam War. *Tinker* v. *Des Moines School District*, 393 U.S. at 517-18. Upon this kind of evidence, the United States Supreme Court held that there was no showing of an actual disruption; and that the "evidence" of a "specific showing" of an imminent material interference with school activities was insufficient to justify the administrators in curbing the First Amendment rights of the Tinker children. As in the instant case, the Des Moines School authorities indicated to the Court their belief that such armband demonstrations tended to undermine the confidence students hold in their teacher's authority, and tended to involve the school in a subject matter discussion which may well be unpopular with the community-at-large.

On the other hand, in *Blackwell*, large numbers of students foisted buttons upon unwilling students; classroom sessions were halted by the parceling out of the SNCC buttons; several students deliberately absented themselves from their classes to dispense SNCC buttons to other students; and, in the words of Judge Gewin of the Fifth Circuit Court of Appeals, a "state of confusion" existed in which there resulted "a general breakdown of orderly discipline" throughout the school.

The record in the instant case, like that in *Tinker*, is devoid of the kind of "reprehensible conduct" present in *Blackwell* which Judge Gewin described as "inexorably tied to the wearing of the [SNCC] buttons." All concerned in the present

case plainly admitted that there was not a single instance of actual violence, disruption or interference with the rights of others.

Of course, there are allegations in the instant case of a deterioration of respect by students for teachers and of likely disapproval of the pamphlets by the parents of college age students. Similar allegations were made in *Tinker* and dismissed as speculative fears, because of a lack of a specific evidentiary showing of actual or imminent harmful effect of the requisite magnitude to proscribe otherwise protected speech. As the Court said in *Tinker*:

> "In order for the state in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school', the prohibition cannot be sustained." 393 U.S. at 508-09.

Although the record in this case does reveal that 25 students resented the pamphleteering of the Appellants, this reaction provided no basis for proscribing free speech.[5] In *Tinker* the Court apparently found insubstantial in its effect on school activities and discipline the "comments, warnings by other students and 'poking fun at them [the Tinker children]" as well as the counter "warnings by an older football player that other non-protesting students had better let them alone." 393 U.S. at 517.

Thus, an examination of the evidence in the record reveals that the instant case is almost indistinguishable on its facts

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[5] *See* Part I, *supra*.

from that of *Tinker*.[6] If, in *Tinker*, the United States Supreme Court found the evidentiary record inadequate to support a finding of material and substantial interference with the normal operations of a junior and senior high school; then there is certainly insufficient evidence in the present record to support a finding of "material and substantial interference" in the more adult educational environment of a university campus.

III

In its third general ground, the majority indicates that university administrators have "inherent authority" to prescribe reasonable rules and regulations to prevent "false" and "inflammatory" expressions. Superficially, this regulatory power would seem to be an appropriate one to invest in expert university officials. *See Goldberg* v. *University of California*, 248 Cal. App.2d 867; 57 Cal.Rptr. 463 (1967).

In my opinion, however, the United States Supreme Court has found "inherent authorities" granted under such circumstances to be constitutionally deficient in two respects. First, one may not constitutionally conclude from the mere making of a false and inflammatory statement that it creates, in and of itself, the requisite substantive evil of material interference with the normal operations of a university which is necessary for the proscription of free speech. Second, an investment of discretionary authority to proscribe and to punish the making of false and inflammatory statements without a specific showing of a material interference with normal campus activities is unconstitutionally broad.

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[6] It is quite true that the *Tinker* record does not include allegations of false and inflammatory language. But the discussion of this Part fully considers all the alleged effects — actual and probable — of such statements; hence the conclusion that *Tinker* and the instant case are evidentiary analogues with regard to actual or probable effects of material interference — is correct. To the extent the majority opinion rests upon a finding that false and inflammatory language — in the absence of evidence of actual or probable material interference — is unlawful, see Part III, *infra*.

First, to say that false and inflammatory language — of itself — obviates the need to show probable or actual occurrence of material disruption in campus discipline or academic performance is to disregard the fundamental basis of the "clear and present danger" policy. As the United States Supreme Court noted in *Dennis* v. *United States*, 341 U.S. 494, 506-07 (1951), the underlying purpose of the doctrine of "clear and present danger" is to prevent certain speech from being proscribed upon a "showing that there was no danger that the substantive evil would be brought about."

In a spate of recent decisions, the United States Supreme Court has rejected the notion that an unlawful effect can be inferred from the face of a document which contains false and inflammatory language. Indeed, the Court has insisted upon a specific evidentiary showing of the prohibited effect before permitting proscription of speech. Thus, in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), the United States Supreme Court overruled a dismissal of a teacher based on a presumption by the Board of Education that his "false" statements about the necessity of a school bond issue and the policies of his school administration were *per se* harmful to the operation of the schools. And in *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969), the Court held that one could not presume that "encouragement" of unlawful conduct would reach the stage of incitement; and hence, a state statute had to be narrowly drawn so as to proscribe only the latter and not the former. See also, *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967) (striking down teacher loyalty oath covering "seditious and treasonable" words or acts); *Ellbrandt* v. *Russell*, 384 U.S. 11 (1966) (striking down a teacher loyalty oath which conclusively presumes that those who join a subversive organization share in its unlawful aims).[7]

[7] A second line of cases — *New York Times Co.* v. *Sullivan*, 376 U.S. 254, and its progeny — inferentially challenge the constitutionality of concluding that the mere publishing of false and inflam-

Finally, in *Tinker* the Court held:

> "In the absence of a specific showing . . . that . . . conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school' . . . *Burnside* v. *Byers*, supra at 749, students are entitled to freedom of expression of their views." 393 U.S. at 511.

There can be no question of university officials' power and responsibility to prescribe rules which are reasonably related to protection of the state's interest in the university. Where expression is the proscribed subject matter, however *Tinker*, read in the context of *Pickering*, *Brandenburg*, *Keyishian*, and *Ellbrandt*, requires, as one element of the offense, an evidentiary showing of actual or probable material interference with the normal operation of the university.[8]

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matory statements creates a presumption that such language is, in fact, disruptive and may be proscribed. The *New York Times* rule holds that in matters of public interest, a state cannot authorize recovery for defammatory statements directed at a public official except when such statements are shown to have been made with "actual malice" — that is, either with knowledge of their falsity or with reckless disregard for their truth. *See*, *Pickering* v. *Board of Education*, *supra*, 391 U.S. at 573. I have not discussed this line of cases because I do not believe that the majority opinion relies on a violation of the *New York Times* rule, rather it is relying on an "inherent authority" to punish statements which are false and inflammatory and calculated to arouse others without any showing of actual malice, knowledge of the falsity of the statements or reckless disregard of the truth on the part of the students.

If the majority opinion is relying on the *New York Times* rule to any extent, there is a total lack of evidence in the record to support the United States Supreme Court definition of "actual malice" stated above. Certainly, evidence that the students' pamphlets were "calculated to arouse resentment" on the part of both teachers and students is not sufficient evidence to support a finding of actual malice. As the United States Supreme Court quoted from *Cantwell* v. *Connecticut*, 310 U.S. 296, 310 (1940):

> "To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

[8] *See* n. 4, *supra*.

Second, even assuming that this were not so, the breadth of discretion given to campus officials is constitutionally impermissible. University authorities are given virtually unqualified discretion to choose which false and inflammatory statements will be punished, and which will not be punished, without being required to support such a choice with a showing of material interference with the normal activities of the university. Such unqualified discretion may well be utilized to condone abrasively asserted -- but not offically approved -- sentiments; or what is worse, it may be used to suppress sentiments with which officials do not wish to contend.

The exercise of First Amendment rights can not depend upon whether an expression casts praise or obloquy upon matters or persons of public concern. I am of the opinion, from an evaluation of the whole record that had the students followed the same course of conduct and authored a document praising the present policies of the University administrators, and condemning the recommendations of the American Association of University Professors, no disciplinary action would have been taken.

This selective use of discretion to eliminate unflattering opinions of ones nominal superiors was a subject of concern to the United States Supreme Court in *Pickering*. In *Pickering*, the United States Supreme Court speculated that the real cause of Pickering's dismissal was not any detriment to the school system from false statements made by Pickering, but the Board's reaction to criticism of its own members.[9] The Court observed:

> "However, the *only way in which the Board could conclude, absent any evidence of the actual effect of the letter that the statements contained therein were per se detri-*

[9] Among the stronger statements made by Pickering, "that's [prior approval of letters written to public newspapers] the kind of totalitarianism teachers live in at the high school, and your children go to school in." (Emphasis added) 391 U.S. at 576-77.

> *mental to the interest of the schools was to equate the Board members' own interests with that of the schools* . . . . Such an accusation reflects rather a difference of opinion between Pickering and the Board as to the preferable manner of operating the school system, a difference of opinion that clearly concerns an issue of general public interest." (Emphasis added) 391 U.S. at 571.

And in *Tinker*, the Court noted that in granting an official the discretion to proscribe free expression, care must be taken to assure that a "particular opinion" is not "singled out for prohibition."

> "In our system, students may not be regarded as closed circuit recipients of only that which the State chooses to communicate. They may not be confined to that expression of those sentiments that are officially approved . . . . As Judge Gewin, speaking for the Fifth Circuit, said, school officials cannot suppress 'expressions of feelings with which they do not wish to contend.' *Burnside* v. *Byers*, supra, at 749. *Tinker*, supra, 393 U.S. at 511.

The policy underlying *Pickering* and *Tinker* is that limiting another's expression — be it inflammatory or false — on the basis of the ideas it expresses is repugnant to our democratic institutions. Hence, the United States Supreme Court observed:

> "In order to submerge the individual and develop ideal citizens, Sparta assembled the moles at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and state were wholly different from those upon which our constitutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution." *Meyer* v. *Nebraska*, 262 U.S. 390,

402 (1923) (striking down in 1920 a state statute prohibiting the teaching of any language other than English when applied to the teaching of the German language to a child of ten years of age).

Absent a showing of material interference with school activities, it is constitutionally impermissible to give campus officials discretion so broad that there exists an almost irresistible invitation to censor those expressions personally offensive to them.

I would reverse the judgment of the District Court.

ORAL OPINION OF THE DISTRICT COURT

[155] THE COURT: This is a problem that has come before the Court on a number of prior occasions, as the attorneys in this case very well know, and it is, as I have previously pointed out, the function of a Court in these situations, to determine whether or not the students have been afforded procedural due process, have been given a fair hearing, whether or not the essentials of due process of law have been complied with, not in the strict sense of the word as it pertains and applies in a court of law, but in the sense of fundamental fairness, considering that we are dealing with students on the campus of a university or college, and not with citizens at large in the community, and considering also the nature and character of a university or college, its functions and its purposes, why the students are there, and so on.

That simply means, as the attorneys in this case have already commented upon and pointed out, that the administration is not required to give to a student the type of hearing or the type of notice that would be required in a court of law. The niceties of common-law procedure, the technicalities of that procedure, do not constitute the test to be applied in this situation, so each case must be decided largely on its own merits and tested by this principle of [156] fundamental fairness.

It goes without saying, and I think it is obvious to everyone that a Court should not, unless a case for interference is clear, undertake to set aside the considered determinations of the disciplinary authorities of a university or a college. The Court should satisfy itself very carefully that that course is required before intervening.

It is a very serious matter, of course, for a Court to interfere with the administration of an institution such as the one involved in this case, and to substitute its judgment for the judgment of the constituted authorities of the institution, and I do not propose to do that in this case; I have refrained from

doing so in any other case that has been presented to me. I deem it to be the duty of the Court, if possible to do so, to support the findings and conclusions of the administration and to inquire only as to whether the constitutional rights of these students have been violated, or as to whether procedural process has been denied them.

The only reason this case is here at all is because this is a state-supported institution. If this were the case of a privately-owned institution, this case would not be in this Court. It comes to this Court because this is a state-supported, tax-supported institution, and consequently comes within the ambit of the 14th Amendment, involving state action.

[157] For that reason, the Courts have been called upon to evolve rules that would be applicable in student disciplinary cases. This problem was dealt with in the Dixon case, and in the Knight case decided in this Court, and in the Jones case, also decided by this Court.

We come to the exact situation involved here, and we find that students received approximately three days' notice of the charges against them. The charges were that they had distributed literature on the college campus of a false, seditious and inflammatory nature, and exhibited with the stipulation in this case and also with the complaint, we find two items of literature referred to in the notice which was given to the students.

I believe in the case of one student, no written notice was given; it was an oral notice, and I believe the hearing was called for the next day. I am addressing my remarks for the present to those instances in which written notice was given.

The notice in each case was substantially as follows:

> "In recognition of your rights as a citizen, this notice is sent to you to appear before the Discipline Committee on Monday, June 3, 1968, in Room 205 of Gilbreath Hall, to answer charges of the alleged distribution on the campus of East Tennessee State

[158] University of materials which are of a false, seditious and inflammatory nature."

This notice, while it could have been spelled out in more detail, and could have been more specific, it seems to me was adequate to advise or forewarn the students of the charge upon which the hearing would be held.

Material which is "false." Certainly there is nothing indefinite about that particular term.

"Seditious" could have a somewhat more ambiguous meaning, I think. One witness testified that this should be construed in the context of the university, referring to the university itself, seditious with respect to the university, and not with respect to the government, and probably that was the meaning intended, although that is not spelled out.

Then the words are added "and inflammatory in nature." It seems to me that the terms "false" and "inflammatory in nature," taken together, constitute sufficient notice of the charges which were to be heard by the committee.

The notice in this case was approximately three days. I feel certain that there is no arbitrary time which satisfies or which is required, no minimum time which is required, to satisfy due process in all cases, and the question is whether or not in each case on the facts of [159] that case, the notice is sufficient, and as I construe this charge, the committee was interested in giving these students a hearing to determine whether or not this particular literature was false, seditious and inflammatory in nature, thus limiting the hearing primarily to a consideration of the literature itself, that is, the wording of it, its nature and character, on its face.

There is no indication in this notice that there was to be a general inquiry at which witnesses would be called to determine the actual effect of these distributions on the integrity of the institution, or whether or not they had been disruptive, but a consideration of the literature itself and whether or not the

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literature had been distributed by the students.

Those are the charges as I construe them, and construing them in that light and considering the charge to be thus limited, it seems to me that the three-day notice was adequate.

At the hearing on June the 3rd, I believe it was, 1968, the students were questioned at length by various members, if not all members, of this committee, made up of the various deans of the institution, and they were given a full opportunity in response to these questions, and also, I am sure, in volunteering any answers they saw fit, to give or make any statements they saw fit to give to convince the [160] committee (a) that they did not distribute the literature, or (b), if they did, that the literature was not inflammatory, seditious or false in character.

It seems to me that there was no necessity for calling witnesses, and I do not believe there is any indication in this evidence from the standpoint of anyone of these students that if afforded that opportunity, there was any witness they could have called who could have thrown any light on the wording of these circulars. There was no witness they could have called who could have either added to or detracted from the pamphlets. They readily admitted that they did participate in the distribution of the pamphlets, one or both. Some took part, I believe, in one and not the other, and some participated in distributing both items referred to.

If this were a case in which there was a clear conflict in the evidence, the students alleging one thing having taken place or occurred, and the administration alleging something else, then there would be more merit in the proposition that they should have been afforded opportunity to call witnesses in their behalf to support their particular position, whatever it may be, but in this case, there is no conflict. The students admitted that they distributed the literature.

Then whether or not that literature was disruptive or inflammatory is a matter to be determined on [161] the face of the documents themselves, and I wish to emphasize that point. I

don't agree with Dean Davis that one could say without proof that this literature actually resulted in disrupting this institution. There was no proof to that effect, and there was no proof offered before the committee, and if that had been charged, I would probably take a different view, i.e., that these students should have been afforded the right to call in witnesses that such disruption did not take place.

I think the disciplinary committee had the full and complete right in representing this institution to go over this literature with these students and make these two determinations I have just mentioned, and even if they found (a) that they did distribute the literature, and (b), that it was inflammatory, the committee still could have found, after determining the attitude of the students and what their responses were, that either there should be no punishment at all, or that the punishment should have been something less than that which was actually meted out in this case, but that in my view was a matter which addressed itself to the discretion of the disciplinary committee.

They apparently and evidently felt, after interviewing each one separately in the light of their admissions, and in the light of the literature and the nature and character of it, that suspension was the proper punishment, if we may call it that, which should be imposed in each case, [162] suspension not being, as has been very accurately pointed out, the same as expulsion or dismissal from the institution, but involving the right, in a sense, to have a rehearing or a reevaluation or redetermination of the matter, either on the disciplinary committee's own motion, or upon the application of the student if the disciplinary committee saw fit to do so. After such rehearing and careful reconsideration of the matter, the committee could, theoretically, determine or decide that the student could adjust to university life, to its regulations, its reasonable rules and regulations and so on, and could properly pursue an education at the institution. In such event, the committee might see fit to reinstate him or vacate its prior

order.

I think it is very significant in this case that these charges were, on the application of each student, reviewed by the president of the university, and according to his statement, he gave them full advice that if they wanted a lawyer, they would have a right to have one, that they could talk freely and make any disclosure that they saw fit to him, and that he would give their cases very careful consideration. Of course, that is the purpose of the president being there, to do things like that. It is his ultimate responsibility and authority to determine what kind of disposition should be made in cases of this kind, and he did that, and he did it in a very responsible and careful manner, and not only was the [163] disciplinary committee unanimously of the opinion that these documents did have a disruptive tendency and effect and that they were inflammatory in character such as were calculated on their face to be damaging to the institution and to good order and discipline on the campus, but the president himself, independently of the committee, came to the same conclusion.

Having done this, this Court is of the opinion that it should not substitute its judgment for the judgment of the proper authorities on that proposition. I inquire only whether there is a reasonable basis to support the conclusion of the university authorities that the documents were disruptive in character.

I might independently reach a different conclusion and I may not, but that is not my inquiry, that is not my responsibility. It is the responsibility of the university authorities, and if they were reasonably justified in saying that the literature was disruptive, or that it was inflammatory, and that parts of it were false, then their judgment and findings are not to be set aside by this Court. This Court would have no authority to do so and should not do so.

We now come to the request for an attorney. I don't see in this case where any right to a lawyer was denied. If they wanted to have a lawyer, they had the three days to have a lawyer

present, and it is not very clear that they, [164] in each instance, made a definite request for an attorney in any event. I think this is a matter which addressed itself to the discretion of the committee at the time that the request was made for the first time on Monday morning. I believe in one case, however, a student did take it up with Dean Ross, and she encouraged the student to get a lawyer if that could be done, but that was not possible because the lawyer could not be present on Monday. But in any event, I don't think that the failure to have a lawyer present under the circumstances of this case constituted a denial of due process of law.

There may be some cases where a student would have the absolute right to have a lawyer present in a disciplinary case. I'm not saying that that is true as a matter of law or not, but I do not think so on the facts of this case.

Now whether or not these documents do come within the area of protected First Amendment activity, we have to remember that you can say a lot of things out on the street and out in the marketplace or even shout things from the housetops or rooftops that you cannot say on the campus of a university.

These documents are obviously abrasive in character. There is language there which is abrupt and rude and calculated to arouse resentment, not only on the part of [165] the administration, but on the part of the students, and I do not see that this kind of language is at all necessary to promote the legitimate objects of students on the campus of a university.

It seems to me it would be much more effective to address remarks critical of the administration in more acceptable language. Firmly expressed language which clearly indicates the opinion of the writer of the article, but at the same time is not of an inflammatory character, ordinarily would be protected. Obviously in this case, many of these similes and metaphors and examples used are of a very rude character, to say the very least of it, and one of the documents is susceptible of the interpretation that the writer of the article is encouraging the

kind of demonstrations which had occurred on other campuses throughout the country. He denies that he meant that, but that is not the point. The point is how may other students reasonably construe the language, and I think they can or could very easily construe it logically to mean that the writer of the article was calling upon the students to engage in the same kind of conduct and activity which had occurred in France and at Columbia University and other places.

This case has been well presented by both sides, by the plaintiffs' attorney and by the attorneys representing the defendants. Various points have been clearly developed [166] and brought out, and it is the type of case where a student may reasonably feel that he has a grievance. I have no criticism against any plaintiff or any attorney for the case being here, but I simply feel that it would be an extremely serious matter for this Court to undertake to set aside the deliberate and very carefully worked out findings and conclusions of the university authorities.

This is a big institution up there, and it is growing rapidly. I have no doubt that problems are accumulating very rapidly, and I think it behooves all of us, insofar as we fairly and reasonably can, to give full support to the authorities who are charged with this serious responsibility.

I want to suggest to the disciplinary committee, or the discipline committee, I believe you call it, and to the president of the university, that in the case of——who is this student going to law school?

MR. GARBER: Garber, sir.

THE COURT: Garber, that if he requests it, that you give him a hearing in the reasonably near future to reevaluate his case. I am not undertaking to say that you should reinstate him or not reinstate him, that is a matter for the university to determine, but I would like to see in his case, since time is of the essence, if he requests it, a rehearing or reconsideration of the matter by the committee, [167] and then followed

subsequently by a review of the president of the university.

And also in the case of any of the other students, if they request it, that you also afford them a hearing, but I am sure that is already implicit in the findings you have made anyway, and if these students——the attitude of some of the students here on the witness stand rather impressed me as showing some degree of willingness to adjust to the rules and regulations of the university, and perhaps they can be salvaged and be reinstated. But again, that is a matter for the university and not for the Court.

Now there was one student who had oral notice and only one day notice. What was his name?

MR. FOX: Coker.

THE COURT: That is rather short notice. There is no arbitrary rule requiring written notice in disciplinary cases. He was one of these students that testified here today that I thought showed a pretty good attitude, and I think that it would be well to afford him another hearing as soon as possible, and see if he could be reinstated.

He did not ask for a lawyer. He was given a full opportunity to express himself before the committee. He readily admitted the participation in both documents, first and second pamphlets, and that fact having been established, [168] then it was a simple question for the committee to decide whether or not the literature was of such character that it justified suspension, so I think the same principles actually apply in his case as do in the other cases.

I will ask the defendants' lawyers to get up a full and complete findings or fact and conclusions of law, that is, proposed findings of fact and conclusions of law, and submit them to opposing counsel for her consideration, and then let them be submitted to the Court, and also a form of suggested judgment in this case.

MR. FOX: Yes, sir, we will see that that is done.

THE COURT: That's all then. Adjourn Court.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

MARIETTA NORTON, et al., Plaintiffs,	]	
v.	]	Civil No. 5102
DISCIPLINE COMMITTEE OF EAST TENNESSEE STATE UNIVERSITY, Defendants.	]	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial and the Court having duly considered the evidence and being fully advised now finds the following:

FINDINGS OF FACT

I.

That plaintiffs were charged with distributing literature of a false, seditious and inflammatory nature on the campus of East Tennessee State University. A copy of the literature is included as Exhibit A to the stipulation of the parties.

II.

That all students received three days written notice of a hearing to be conducted relative to the charges, except plaintiff David Coker who received a one-day oral notice and plaintiff Oscar Heffner who received one-day written notice. Plaintiff Heffner appeared with counsel for the hearing.

III.

That although the notice could have been more specific, it

was adequate to forewarn the students of the charge. The word "seditious" has a somewhat ambiguous meaning, but the words "false" and "inflammatory," taken together, constitute sufficient notice of the charges.

IV.

That the notice indicated that the purpose of the hearing was to determine: (a) whether these students had distributed the literature; and (b) whether the literature was false, seditious and inflammatory on its face. The hearings before the committee were limited to a consideration of the literature on its face, i.e., as to wording, nature and character.

V.

That the notices of the hearings, which were limited to these questions, were timely and adequate.

VI.

That individual hearings were conducted by the Discipline Committee of East Tennessee State University, which is composed of nine Deans of that institution. Each student was given full opportunity to make any statement to convince the Committee that he did not distribute the literature or if he did, that the literature was not of a false, seditious, or inflammatory nature.

VII.

That all of the students admitted that they distributed the literature.

VIII.

That there was no necessity for the calling of witnesses as the evidence indicates that the literature was considered on its face and that there were no witnesses who could have either added to or detracted from its words and terminology.

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IX.

That the Discipline Committee was unanimously of the opinion, and so found, that the documents were distributed by the students charged and that when considered on their face, were of a potentially disruptive character, and were inflammatory in nature in that they were calculated to be damaging to the institution and to good order and discipline on the campus.

X.

That the Committee determined that suspension was the proper punishment.

XI.

That the President of the University reviewed the decision of the Committee on the application of each student, after calling each before him and hearing his statement; he advised each student of his right to counsel in the hearing before him; and he urged each student to talk as freely as he saw fit. The President informed the students that he would give their cases careful consideration, which he in fact did.

XII.

That the President in a very careful and responsible manner determined that the documents very probably would have a disruptive effect and that they were false and inflammatory in character such as were calculated on their face to be damaging to the institution and to good order and discipline on the campus.

XIII.

That no student was denied his right to a lawyer before the Committee; that the question of a continuance of the hearing to obtain counsel was a matter which addressed itself to the discretion of the Committee as the request was presented for the first time at the hearing; that in one instance a student was

urged, before the hearing, by a member of the Committee to retain counsel if such could be done; and that failure to have a lawyer present under the facts of this case was not prejudicial to the plaintiffs and did not infringe their constitutional rights.

XIV.

That the Discipline Committee could properly have found that these documents were abrasive, abrupt and rude in character and that they were calculated to arouse resentment both on the part of the administration and on the part of the students of East Tennessee State University.

XV.

That at least one document is susceptible of the interpretation that the writer of the article is encouraging demonstrations similar to those which had occurred on other campuses throughout the country; and the article can be reasonably and logically construed to mean that the writer of the article was calling upon the students of East Tennessee State University to engage in the same kind of conduct and activity which had occurred at Columbia University and elsewhere.

XVI.

That these documents do not come within the area of protected First Amendment activity when considered in the context of this case involving a distribution of literature by students on a university campus.

CONCLUSIONS OF LAW

From the foregoing facts the Court concludes:

I.

That the above facts clearly demonstrate that the plaintiffs were afforded a fair and adequate hearing and the Court should

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not substitute its judgment on matters so determined for the judgment of the proper authorities.

II.

That it is the function of the Court to determine whether or not the students have been afforded procedural due process. Each case must be decided on its own merits and tested by the principles of fundamental fairness. The Court must consider that it is dealing with students on the campus of a university, and not with citizens at large in the community. It must also consider the nature and character of a university, its functions and purposes, and the purpose of the students in being there.

III.

That a court should not set aside the considered determination of university authorities in matters of administration and student discipline unless infringement of constitutional rights is clearly shown.

IV.

That notice must be sufficiently definite to advise students of the charges against them but there is no arbitrary minimum time which is required to satisfy due process requirements. The question of adequate time and sufficiency of charge must be determined upon the facts of each case.

V.

That a discipline committee has the right in representing an institution in matters of discipline to consider any pertinent literature on its face, along with any statements by the students who are writing and distributing the literature, and to determine whether the students did distribute the literature and whether it was false and inflammatory. The punishment to be meted out in such instances is a matter addressed to the sound discretion of the discipline committee.

VI.

That suspension is not the same as expulsion, but involves the right to have a re-evaluation of the matter on the discipline committee's own motion, or upon the application of the student, if the discipline committee determines such should be done.

VII.

That a student's right to counsel in a disciplinary case is not generally absolute and must be considered upon the facts of the case. Failure to have counsel in this case was not prejudicial to the plaintiffs nor a violation of their constitutional rights.

VIII.

The documents considered herein are not entitled to the absolute protection of the First Amendment but must be considered in the context of a university campus. No constitutional violation is shown by the action of these officials.

IX.

That the language of the literature is to be considered as it might be reasonably and logically construed by other persons reading it.

/s/ William E. Miller

UNITED STATES DISTRICT JUDGE

ANALYSIS OF TRUTH OR FALSITY OF FACTS STATED IN LEAFLETS

Here, no findings of fact were prepared by the Discipline Committee and no witnesses were called to the hearing; this in itself is a violation of due process. This analysis is, however, presented to facilitate such re-examination of the constitutionally relevant facts as is appropriate. See *Pickering v. Board of Education*, 391 U.S. 563, 578-82 (1968).

Joseph Garber testified that the committee pointed out only one minor inaccuracy to him—a date. (126a)[1] Marietta Norton testified that when the Discipline Committee asked her whether a particular passage in the literature was true, she said that "I thought it was true; to the best of my knowledge, it was true." (55a) Students Garber, Coker, and Crawford testified that the statements in the literature were true to the best of their knowledge at the time that they distributed the leaflets. (75a, 99a, 109a) President Culp, on the other hand, testified, without elaborating, that 10 of the 11 opening remarks were false, (176a) but of course this was not evidence at the hearings. In fact, this statement must have been erroneous, as demonstrated by Dean Davis' testimony on the censorship issue.

Much of the contents of the leaflets was opinion and value judgment, hence not capable of a true-false analysis.

The following is evident on the eleven statements referred to by President Culp:

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[1] The Court asked Mr. Garber: "[D]o you think they have the obligation to point out every part of it that they think is false, the burden is on them in other words?" (126a) The question may well have been merely for the purpose of eliciting information, but the context and the ultimate decision suggest that it is a manifestation of an erroneous view of due process. There must be some burden on the accuser to prove allegations of wrongdoing.

1. Payment for land – admittedly true. (176a)

2. School's athletic status – no specific testimony in the record.

3. Administration has forbidden latest women's fashions – the dress rules are at 163a, they do provide some restrictions; counsel see no point in entering the field of ladies' fashions. (See 143a for the truth of the "threat of riot" in connection therewith.)

4. Student library employee fired for having a beard – based on newspaper article. (87a)

5. ROTC is mandatory and school gets paid so much per head – ROTC is clearly mandatory but President Culp had later told Garber that the University was not paid by the head. Garber had based his belief in the truth of the statement on someone's investigations; there are conflicting stories on the campus. (87a)

6 and 7. Bookstore monopoly and cafeteria food – no specific testimony (but most campuses do have only one bookstore which, along with the food, is a perennial subject of complaint).

8. Censorship of school newspaper (see Statement of the Case, pp. 9-11).

9. "Women's social rules were maintained at a level of liberality that was old when Queen Victoria was young . . . ." – students have had such opinions and complaints ever since before Queen Victoria was young.

10. Campus police carry guns – President has said he doesn't know about this, but "Of course anybody who has been on campus knows that they do . . . ." (86a)

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11. New heights of rudeness, inefficiency, and intolerance – although "intolerance" may not have been the wisest choice of words, the other two descriptive nouns were intended to and did perfectly describe the most recent registration. (98a-99a)

There was a statement on rights of students as regards speech, dress, and parietal rules. While this Court has not yet determined whether it approximates the law, it, with allowance for hyperbole (an allowance not granted by the court of appeals (5A)), is at least rooted in respectable first amendment theory.

The rest of the factual statements are wholly uncontroverted.

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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1011

MARIETTA NORTON, et al.,
Petitioners,

v.

THE DISCIPLINE COMMITTEE OF EAST TENNESSEE STATE UNIVERSITY, et al.,
Respondents.

BRIEF
In Opposition to the Petition for the Writ of Certiorari

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INDEX

Page

Suggestion of diminution 2

Jurisdiction 3

Counterstatement of questions presented 4

Counterstatement of the case 5

Argument 10

Conclusion 20

Cases Cited

Adderley v. Florida, 385 U. S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149 11

Barker v. Hardway, 399 F. 2d 638 (4th Cir. 1968) .. 18

Cox v. Louisiana, 379 U. S. 536, 85 S. Ct. 453, 13 L. Ed. 2d 471 11

Dixon v. Alabama State Board of Education, 294 F. 2d 150 (5th Cir. 1961), cert. den. 368 U. S. 930 16

Esteban v. Mo. State College, 290 F. Supp. 622 15

Feiner v. New York, 340 U. S. 315, 71 S. Ct. 303, 95 L. Ed. 295 10

Goldberg v. Regents of the University of California, 248 A. C. A. 1015, 57 Cal. Rep. 463 .....11, 13, 18

Jones v. State Board of Ed. of and for the State of Tenn., 279 F. Supp. 190 15

McCulloch v. Maryland, Vol. 17, U. S. Sup. Ct. 318, 4 Wheat. 2d 314, 4 L. Ed. 578 19

Pickering v. Board of Ed. of TP. H. S. Dist. 205, Illinois, 391 U. S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 .....11-12, 14

Schenck v. United States, 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed. 470 ..... 10, 12
Soglin v. Kauffman, 295 F. Supp. 978 18
Sweezy v. New Hampshire, 354 U. S. 234, 77 S. Ct. 1203, 1 L. Ed. 2d 1311 13
Taylor v. McElroy, 360 U. S. 709, 79 S. Ct. 1428, 3 L. Ed. 2d 1528 3
Tinker v. Des Moines Independent School District, 393 U. S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 12

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BRIEF

In Opposition to the Petition for the Writ of Certiorari

MAY IT PLEASE THE COURT:

The petitioners seek a review by this Court of a judgment and opinion rendered by the United States Circuit Court of Appeals, Sixth Circuit, sustaining a judgment of the United States District Court for the Middle District of Tennessee which upheld the decision of the President

and the Faculty Discipline Committee of East Tennessee State University to suspend indefinitely the petitioners' enrollment at that university. They, of course, insist that the decision of the United States Circuit Court of Appeals, Sixth Circuit, the decision of the United States District Court and of the East Tennessee State University officials should be reversed.

SUGGESTION OF DIMINUTION

The petitioners consist of eight (8) students at the university aforementioned. Since their enrollment was suspended, and after the hearing in the United States District Court, one (1) of the petitioners, Joseph Rene Garber, applied for re-admission, which was denied by the Faculty Discipline Committee, but on appeal to the President had his re-enrollment authorized and has now graduated with a Bachelor's degree. Four (4) other petitioners, George Elmer Ball, David Wayne Coker, Richard Lawrence Crawford and Michael V. Haga, applied to the Faculty Discipline Committee. Each was given a re-admission date, but not at the next registration for enrollment of students. Their decision was appealed to the President of the university and he moved the date for their enrollment to the next registration for that purpose. None of these four (4) registered as authorized. Another petitioner, Marietta Anderson Norton, was authorized to re-enroll at the university at the beginning of the Winter Quarter, January, 1969. She did not appeal to the President of the university nor did she enroll as authorized. Oscar Alphonzo Heffner, Jr., was denied readmission to the university and he made no appeal to the President. Robert Louis McCall made no application for readmission but did make inquiry regarding his reenrollment. He was informed that an opportunity would be scheduled to consider the matter at his convenience. He made no application. (This petitioner was dropped from the uni-

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versity rolls for academic reasons as well as for disciplinary purposes.)

Thus, it clearly appears that six (6) of the petitioners have been given an opportunity to reenroll at East Tennessee State University. Only one (1) of that group reenrolled and he has since graduated. One (1) made no application for readmission as he was advised he could do, and one (1), after being denied the privilege of reenrolling by the Faculty Discipline Committee, made no appeal to the President of the university to overrule the decision of the Faculty Discipline Committee, which was available to him and by which six (6) of the others obtained a modification of the Faculty Discipline Committee's decision with respect to their enrollment, a circumstance this student, Heffner, knew or should have known.

This suggestion of diminution is made by authority of **Taylor v. McElroy**, 360 U. S. 709, 711, 79 S. Ct. 1428, 1429, 3 L. Ed. 2d 1528, 1530, where it was said with respect to an employee who had failed a security clearance by the Defense Department after the security regulations had been changed so as not to affect them adversely:

> "In view of the fact that petitioner has received clearance, the ultimate relief which he demanded, and in view of the representations of the Solicitor General to the effect that petitioner stands in precisely the same position as all others who have been granted clearance, that the evidence in petitioner's file will not be used against him in the future, and that the findings against petitioner have been expunged, this case is moot."

JURISDICTION

Counsel for the respondents admit the jurisdiction of the Court under the authority cited by counsel for the petitioners.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Counsel for the petitioners have made a long detailed statement of the questions presented. Counsel for the respondents insist that the questions presented by the record are simply:

1. Whether or not the conduct of the petitioners in distributing the leaflets hereinafter discussed was protected by the First Amendment right to freedom of speech?

2. Whether or not the proceeding to determine this question was contrary to the due process clause of the Fourteenth Amendment, Constitution of the United States?

COUNTERSTATEMENT OF THE CASE

The eight petitioners were students at East Tennessee State University. One was a graduate student. They were suspended indefinitely from enrollment at that institution near the end of the school year, early June, 1968, for distributing leaflets on the campus which were critical of the school administration upon the theory that the leaflets were false, seditious and of an inflammatory nature to the extent that they were disruptive of the educative processes at the university. These leaflets are found on pages 11A-17A of the petition and are designated as the "First Piece" and "Second Piece." Petitioner Garber participated in the distribution of the first piece, only. Petitioners Norton, McCall and Crawford participated in the distribution of the second piece, only. Petitioners Coker, Ball, Haga and Heffner had a part in the distribution of both pieces.

All of the petitioners except Heffner and Coker were given notice May 31 (Friday), 1968, to appear before the Faculty Discipline Committee on June 3 (Monday), 1968, at a designated place to answer the charge that they had distributed on the university campus materials which were false, seditious and of an inflammatory nature. The petitioner Heffner was given the same notice May 29, 1968, to appear before the Faculty Discipline Committee on May 30, 1968. Petitioner Coker was not given written notice but notified orally June 4, 1968, to appear the following day before the Faculty Discipline Committee on the same charge. In the oral notice, Coker was informed that the reason for his being required to appear before the Faculty Discipline Committee was his participation in the distribution of the material in question. Each of the petitioners directed to appear on June 3, 1968, was permitted to select the hour for the hearing.

None asked for counsel and none asked for a continuance at that time. Petitioner Heffner appeared for his hearing with counsel. Each petitioner, other than Heffner, did request a continuance when they appeared for the hearing so that they could obtain counsel. Each of the petitioners admitted to the committee they distributed the literature, as stipulated above, and each petitioner was given an opportunity to convince the Faculty Discipline Committee that the literature was not of a false, seditious or inflammatory nature.

Subsequent to the hearing, each of the petitioners was notified that they were found to have distributed material of a false, seditious and inflammatory nature, that they were each suspended indefinitely from attendance at East Tennessee State University as of the end of the Spring Quarter 1968, that their records at the university were encumbered, that each had a right to appeal to the President of the university from the decision of the Faculty Discipline Committee, and that their readmission in the future to the university would be at the discretion of the Faculty Discipline Committee.

The petitioners did appeal the ruling of the Faculty Discipline Committee to the President of the university. The hearings before the President were held June 10, 1968, from about 9:00 a. m. until 7:00 or 7:30 p. m. (the President of the university, Dr. Culp, testified that according to his memory the hearings in his office were held June 10, 1968). This was not questioned or verified. Each petitioner was informed by the President that he could have counsel present for the hearing if the student desired, but he informed them that he would not propose to have a proceeding as would be held in a court of law because he wanted the student to talk freely and easily and to say "whatever and everything that he had to say in his behalf." The students did talk freely to Dr. Culp and their attitude was very acceptable to him.

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Seven days after the hearing in the President's office, June 17, 1968, each of the petitioners received a letter from Dr. Culp informing them that he was upholding the decision of the Faculty Discipline Committee. The body of the letter is as follows:

> "After careful review of your appeal, I am sustaining the decision of the Discipline Committee. Punishment of a student is a most unpleasant matter, amounting to a great burden for a teacher or university official. I certainly regret the necessity for imposing punishment on any student.
>
> "We shall look forward to the time when you are able to convince the Discipline Committee that you are ready to return to the University as a student eager to learn and conform to the institution's expectations for acceptable conduct."

The suit in this cause was filed June 18, 1968. A hearing was held on the 26th of June, 1968. The Court rendered on oral opinion from the bench at the conclusion of the hearing. Later the District Judge made a finding of fact and a conclusion of law consistent with the opinion rendered from the bench. The Court held, among other things: (1) the notice was adequate to forewarn the petitioners of the nature of the charges against them; (2) the notice was timely given; (3) the hearing was conducted before a Discipline Committee composed of the nine (9) Deans at East Tennessee State University; (4) students were given an opportunity to speak freely before the committee during their hearing; (5) the issues before the committee in each hearing were whether or not the students distributed the literature and whether or not the literature was false, seditious and inflammatory on its face; (6) there was no necessity for calling witnesses because each petitioner admitted their part in the distribution of the literature and the board considered the literature on its face; (7) the committee found that the

documents distributed by the students were on their face of a potentially disruptive character and were inflammatory in nature and that they were calculated to be damaging to the institution and to the good order and discipline of the campus; (8) the President of the university carefully reviewed each student's case after advising them of their right to counsel and urging that they talk freely; (9) the President found the documents would very probably have a disruptive effect "and that they were false and inflammatory in character such as were calculated on their face to be damaging to the institution and to good order and discipline on the campus;" (10) failure on the part of the student to have a lawyer present to represent them under the facts in this case was not prejudicial and would not infringe petitioner's constitutional rights; (11) the Discipline Committee properly found the documents to be abrasive, abrupt and rude in character and calculated to arouse resentment on the part of the administration and on the part of students at the university; and (12) the documents did not come within the area of protected First Amendment activities when considered in the context of the case.

The Court then concluded, among other things, that (1) the petitioners were afforded a fair and adequate hearing and that the Court should not substitute its judgment on matters so determined for the judgment of the proper authorities; (2) in matters of this type each case must be decided upon its own merits and tested by the principle of fundamental fairness considering that students are not citizens at large in the community and the character of the university, its function and purpose and the purpose of the students in being there and it was proper for the committee to consider the literature on its face along with statements by the distributors and authors thereof; and (3) suspension is different from expulsion in that it involves the right of the Discipline

Committee to re-evaluate the matter on its own motion or upon the application of the student.

The decision of the United States District Court was appealed to the United States Circuit Court of Appeals, Sixth Circuit. The United States Circuit Court of Appeals, Sixth Circuit, as stated before, upheld the decision of the United States District Court on both questions that the leaflets were false and inflammatory and of a disruptive nature, and that the petitioners had not been denied due process of law.

ARGUMENT

I

Both the majority opinion and the dissenting opinion by the United States Circuit Court of Appeals, Sixth Circuit, in this cause recognize that if the distribution of the leaflets by the petitioners in this cause would tend to create a substantial and material interference with the educative processes of the university, the university authorities were justified in taking necessary steps to prevent the activity. This is the same principle recognized by this Court several years ago in **Schenck v. United States**, 249 U. S. 47, 52, 39 S. Ct. 247, 249, 63 L. Ed. 470, 473-474, when it was said:

> "We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. Aikens v. Wisconsin, 195 U. S. 194, 205, 206, 25 Sup. Ct. 3, 49 L. Ed. 154. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 439, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

This same principle has been upheld in other cases. In **Feiner v. New York**, 340 U. S. 315, 71 S. Ct. 303, 95

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L. Ed. 295, it was held that the right of free speech did not sanction incitement to riot nor prevent the State from the exercise of its police power when clear and present danger of riot, disorder, interference with traffic upon the public streets or other immediate threat to public safety, peace or order is threatened. More recently, the same principle was reiterated in **Cox v. Louisiana**, 379 U. S. 536, 85 S. Ct. 453, 13 L. Ed. 2d 471, and still more recently in **Adderley v. Florida**, 385 U. S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149, it was held that the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.

The difficulty in the college campus cases, as indicated by the majority and dissenting opinions in this cause by the United States Circuit Court of Appeals, Sixth Circuit, is that of agreeing upon or identifying activity which defeats the purpose for which universities exist. No rational persons insist that the State does not have a responsibility and duty, as well as authority, to maintain institutions of higher learning for the purpose of educating its citizens, imparting learning and the advancement of the boundaries of knowledge and that to fulfill this function it must maintain order on its campus and exclude therefrom those who are detrimental to that purpose. **Goldberg v. Regents of the University of California**, 248 A. C. A. 1015, 57 Cal. Rep. 463.

To solve the problem it is necessary to understand what is meant by what educators designate as a learning situation. This term may not have been definitely defined and may be one that is not susceptible to such a definition. Generally speaking, it is said that the circumstances must be such that there will be a free flow of ideas between the instructor and the student, without fear or intolerance, and free from suspicion, distrust and tension. This Court in **Pickering v. Board of Ed. of TP**

H. S. Dist. 205, Illinois, 391 U. S. 563, 569-570, 88 S. Ct. 1731, 1735, 20 L. Ed. 2d 811, 818, recognized that the type of relationship between people who have to work together depends upon the circumstances and that in some instances mutual understanding and confidence are essential as indicated by the following excerpt:

> "The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning."

To preserve or maintain a learning situation, school authorities cannot on many occasions wait until a riot or rebellion by the students is underway to take corrective measures because a learning situation must surely have been greatly impaired long before the relationship between teacher and student has deteriorated to the point of rioting. This principle was recognized in **Tinker v. Des Moines Independent School District**, 393 U. S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731, when it was held, in effect, that school authorities are justified in taking corrective measures when circumstances exist which lead them to forecast substantial disruption of or material interference with school activities. Likewise, in **Schenck v. United States**, *supra*, the clear and present danger doctrine was not limited to the burning of a building but it was extended to circumstances that were of such a nature as to create a clear and present danger that they will bring about the substantive evil that Congress

has a right to prevent. Stated conversely, activity which substantially or materially disrupts a governmental function or responsibility cannot be protected under the guise of free speech.

In recognition of the difference between the application of the freedom of speech provisions on university campuses from that of the public generally, the Supreme Court of California in **Goldberg v. Regents of the University of California,** *supra,* at 472, said:

> "Historically, the academic community has been unique in having its own standards, rewards and punishments. Its members have been allowed to go about their business of teaching and learning largely free of outside interference. To compel such a community to recognize and enforce precisely the same standards and penalties that prevail in the broader social community would serve neither the special needs and interests of the educational institutions, nor the ultimate advantages that society derives therefrom. Thus, in an academic community, greater freedoms and greater restrictions may prevail than in society at large, and the subtle fixing of these limits should, in a large measure, be left to the educational institution itself."

A similar principle was also mentioned in **Sweezy v. New Hampshire,** 354 U. S. 234, 250, 77 S. Ct. 1203, 1211-1212, 1 L. Ed. 2d 1311, 1324-1325, as follows:

> "The essentiality of freedom in the community of American universities is almost self-evident. No one should under-estimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new

discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

The first sheet distributed by the petitioners Garber, Coker, Ball, Haga and Heffner, after reciting a number of grievances which they, except for Garber, admitted to be false at least in part, asked how the students at the university had reacted. This was followed by additional questions calculated to stir them to act as French, Polish and Czech students had acted, and also the students at other American universities. Clearly, such literature could not be permitted to circulate on any university campus without breaching the trust and confidence necessary between students and school authorities essential for a learning situation to exist. Such leaflets would be bound to cause tension, suspicion and distrust between students and the school authorities. The school authorities and the Federal District Judge were of the opinion that this type of leaflet on its face was a call to the students at the university to take over a building and commit other disruptive acts as was done at Columbia University and other universities throughout the country. This is different from the circumstances in **Pickering v. Board of Ed. of TP H. S. Dist. 205, Illinois,** *supra.* In that case, it was pointed out that the type of relationship required by the teacher and student did not exist between the teacher and the school board, particularly on a matter that was to be deterimned by referendum of the people generally.

In the dissenting opinion in this cause, by way of footnote (United States Circuit Court of Appeals, Sixth

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Circuit, page 27), it is stated that campus officials must have the authority to handle the day-to-day disciplinary problems and prevent any interference with the normal activities of the institution. To maintain this type of capability, the administration and faculty, of course, must have power as well as authority. No instructor can maintain discipline in the classroom without a base of power as well as authority. Leaflets of the type described are bound to greatly depreciate the power of any school authorities. If they cannot prevent leaflets critical of the administration, as these were, containing false statements, as admitted by the petitioners, that are designed to be inflammatory, then it is suggested that they would not have power to command respect at any place on the campus. This type of conduct is not too different from "hanging the dean in effigy" denounced with other conduct in **Esteban v. Mo. State College**, 290 F. Supp. 622.

The second sheet, distributed only by Norton, McCall and Crawford, may not be nearly as abrasive as the first, except the second sheet shows on its face that it was composed and distributed for the purpose of giving moral support to those petitioners who distributed the first sheet. For this reason, counsel for respondents insist that all the petitioners must be in the same category since one group rendered aid and assistance to the other.

II

A statement of due process set out by the Federal District Judge in **Jones v. State Board of Ed. of and for the State of Tenn.**, 279 F. Supp. 190, 197, furnishes adequate guidelines for determining whether or not the students in this case were denied due process. The statement is as follows:

> "The right to due process of law, guaranteed by the Fourteenth Amendment, requires, among other

things, that the accused be granted adequate and timely notice of the charges against him, Frisbie v. Collins, 342 U. S. 519, 72 S. Ct. 509, 96 L. Ed. 541 (1952), a hearing, Powell v. State of Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932), before a fair and impartial tribunal, In re Murchison, 349 U. S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955), and an opportunity to produce evidence in his own behalf, Baltimore & O. R. Co. v. United States, 298 U. S. 349, 56 S. Ct. 797, 80 L. Ed. 1209 (1936)."

The application of the foregoing rules in this type of case was found amplified in **Dixon v. Alabama State Board of Education,** 294 F. 2d 150 (5th Cir. 1961), **cert. den.** 368 U. S. 930. In that case at pages 158-159, the following standards were set forth with respect to timeliness and sufficiency of the notice:

"The notice should contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the Board of Education. The nature of the hearing should vary depending upon the circumstances of the particular case. The case before us requires something more than an informal interview with an administrative authority of the college. By its nature, a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. Such a hearing, with the attend-

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ing publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out. Nevertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college. In the instant case, the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. If the hearing is not before the Board directly, the results and findings of the hearing should be presented in a report open to the student's inspection. If these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that the requirements of due process of law will have been fulfilled."

The procedure followed with the petitioners by the Faculty Discipline Committee and the President meets the foregoing standards.

It is complained that they were not given an opportunity to have a lawyer present before the Faculty Discipline Committee, and it is also complained that they were not given an opportunity to present witnesses. If there were any justification for this argument, such was not the situation when they were given a hearing before the President of the university. He informed each of the petitioners that the hearing would not be a formal adversary type hearing but they would be permitted to have counsel at the hearing and to call witnesses if they desired, but none desired to have counsel or to call witnesses. (Heffner had counsel before the Faculty Discipline Committee.)

In the hearing conducted by the Federal District Court, the petitioners, of course, did have counsel, were permitted to testify and to call witnesses. The State, therefore, insists that at least by the time the hearing was completed in the Federal District Court, there was no denial of due process of law. **Barker v. Hardway**, 399 F. 2d 638 (4th Cir. 1968).

In the hearing it is insisted that the Federal District Judge did not exercise his own judgment with respect to the effect of the leaflets but that he merely reviewed the judgment of the university authorities. This is refuted by the finding of fact and conclusions of law by the Federal District Judge in the following excerpt from page 48A:

> "That the Discipline Committee could properly have found that these documents were abrasive, abrupt and rude in character and that they were calculated to arouse resentment both on the part of the administration and on the part of the students of East Tennessee State University.
>
> "That at least one document is susceptible of the interpretation that the writer of the article is encouraging demonstrations similar to those which had occurred on other campuses throughout the country; and the article can be reasonably and logically construed to mean that the writer of the article was calling upon the students of East Tennessee State University to engage in the same kind of conduct and activity which had occurred at Columbia University and elsewhere."

The petitioners insist that since their conduct was not prohibited by an adequately worded university regulation they were denied due process. The case of **Soglin v. Kauffman**, 295 F. Supp. 978, is cited in support of this position. In **Goldberg v. Regents of the University of**

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California, *supra*, it was said that the action taken by the university was a proper exercise of the university's disciplinary procedure and a proper exercise of its inherent general powers to maintain order on the campus and to exclude therefrom those who are detrimental to its well-being. Of course, implied or inherent authority is as old as the law and no code could ever be sufficiently complete that such authority or power would be rendered unnecessary. This Court in an early case, **McCulloch v. Maryland**, Vol. 17, U. S. Sup. Ct. 318, 4 Wheat. 2d 314, 4 L. Ed. 578, reiterated the doctrine. It has been stated with respect to the courts of this land that the inherent power of the judiciary means that which is essential to existence, dignity and functions of court from the very fact that it is a court. 21A Words and Phrases 17. It is submitted that inherent power is just as essential and necessary to the existence, dignity and functioning of the universities and other governmental agencies duly and legally constituted by the laws of this Nation and of the particular state wherein they are situated.

Counsel for the respondents challenge the premise that universities have now reached the stage in their development that such a code is necessary. Professor Charles Allen Wright, in an Oliver Wendell Holmes lecture at the University of Vanderbilt School of Law in April, 1969, entitled "The Constitution on the Campus" (reported, Vanderbilt Law Review, Vol. 22, pages 1027-1088), discussed this particular question and cited the fact that out of 30,000 students at the University of Texas between September, 1968, and March, 1969, there were 544 cases in which disciplinary charges were brought. From that number of cases, 531 were minor offenses and only 13 were major offenses. The students involved in eight of those offenses waived hearings, leaving only five, or less than one per cent, to be heard by the university disciplinary tribunal. These statistics, it would

appear, refute the idea that a code similar to a city charter with volumes of ordinances enacted pursuant to the charter are needed for the government of university campuses and they would indeed require a great deal of all university effort to administer.

CONCLUSION

Finally, it is insisted that an ideal learning situation where there is a free interplay of ideas between teacher and pupil or professor and student, free from suspicion and distrust and permeated with an attitude of cooperation, mutual respect and appreciation, can only be achieved by a skillful administrator and classroom teacher, under favorable circumstances, and that it is one of such delicacy leaflets falsely and abrasively criticizing those responsible for creating such a situation have a destructive and distractive effect.

Respectfully submitted

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State of Tennessee

Certificate of Service

I, Thomas E. Fox, Deputy Attorney General, State of Tennessee, one of the attorneys for the respondents and a member of the bar of the Supreme Court of the United States, hereby certify that on the 19th day of January, 1970, I served copies of the within brief in opposition to the petition for writ of certiorari on the petitioners by

BLEED THROUGH POOR COPY

mailing said copies in duly addressed envelopes, postage duly paid, to counsel of record, namely, Honorable Charles Morgan, Jr., and Honorable Reber F. Boult, Jr., Five Forsyth Street, N. W., Atlanta, Georgia 30303, and Honorable Karen D. Ennis, 615 Stahlman Building, Nashville, Tennessee 37201.

Thomas E. Fox
Deputy Attorney General
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IN THE

Supreme Court of the United States

October Term, 1969

No. 1011

MARIETTA NORTON, et al.,

Petitioners,

v.

THE DISCIPLINE COMMITTEE
OF EAST TENNESSEE STATE UNIVERSITY, et al.,

Respondents.

PETITIONER'S REPLY BRIEF

on Petition for Writ of Certiorari

The respondents, at pp. 2-3 of their Brief, make a "Suggestion of Dimunition" reciting that some of the petitioners have received permission to re-enter the University. Without specifically saying so, it is their apparent hope that this "suggestion" will raise a question of mootness. Indeed they cannot say that the case is moot, because the students (petitioners) have, in their prayers for relief, asked that any indication of disciplinary suspension be expunged from their records and that they be awarded damages. (7a)

The notation of disciplinary dismissal on a student's records is often more serious than the dismissal itself. This notation prohibits, or at least makes more difficult, the student's enrollment elsewhere and admission to graduate school. It appears on the student's permanent record as a part of the information furnished to prospective employers.

Respondents' recital also omits, as it must, any reference to restrictive conditions upon which reenrollment was offered. This suit was for reenrollment without disability attributable to the suspension.

Respondents' quotation from *Taylor* v. *McElroy*, 360 U.S. 709, 711 (1959) establishes that this case is *not* moot. The quoted language includes: "the evidence in petitioner's file will not be used against him in the future, and that the findings against the petitioner have been expunged. . . ." *Id.*

Thus, contrary to respondents' implication, *Taylor* establishes that there is no mootness problem. *Cf. Carafas* v. *LaVallee*, 391 U.S. 234 (1968).

Respectfully submitted,

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